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JUSTICE

Vol.36 **ACTUALITÉS - REPORT** No.2

CANADIAN CRIMINAL JUSTICE ASSOCIATION - 2021 - ASSOCIATION CANADIENNE DE JUSTICE PÉNALE

JUSTICE

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ISSN 2563-3449 (Print) ISSN 2563-3457 (Online)

JUSTICE

Vol.36 **ACTUALITÉS - REPORT** No.2

EDITORIAL

NANCY WRIGHT
Justice Report Editor-in-Chief

While this edition of the *Justice Report* contains a variety of subjects, each article offers insight into the social-criminal justice nexus. Marc Addo scrutinizes Canada's official reports/commissions on systemic anti-black/anti-Indigenous racism and concludes little aside from studies has been accomplished. For example, the Truth and Reconciliation's call for an end to overrepresentation of Indigenous people in custody and for community sanctions that respond to the underlying causes of offending has not been implemented. John Winterdyk posits 'racism as an ambiguous term in Canada and notes similar concerns and lack of successful initiatives in other countries, even where systemic racism is well documented.

Stefan Horodeckyj explores serious pitfalls inherent to prisons and laments a lack of focus on the social justice and peacebuilding components of Restorative Justice in Canada. Nathan Afilalo reports on the Canadian Institute for the Administration of Justice's roundtables on minority underrepresentation in criminal jury selection. Sarah Borbolla Garcés points to the overrepresentation of visible minorities among those with drug convictions and how post-release stigma further reduces socio-economic opportunity.

Discrimination in Canada goes beyond the rubric of 'race'. According to the Standing Senate Committee on Human Rights (2021), "CSC policies often discriminate against Indigeneity, race, gender, disability, mental health, ethnicity, religion, age, language, sexual orientation and gender identity".

Brandi Chrismas' foray into critical thinking illustrates that poverty and social exclusion can set the stage for criminal decision making. Chanel Blais reveals much the same, although within a framework of Mr. Big stings. Amanda Sherry explores how a book of stories by justice expert Doug Heckbert, questions the legitimacy of the *actus reus* and *mens rea* requirements.

Samantha Barlage shows that domestic violence against women is on the rise in Canada, with one woman or girl killed every 2.5 days on average in 2018. Note also that federally sentenced women – comprising 42% Indigenous overall but up to 66% in the Prairies – are plagued by poverty, homelessness, trauma, abuse, mental health issues, substance addiction, low education, and are primarily serving sentences for non-violent offences. Open criticism of the Canadian CJS has also spurred other reactions, such as calls to treat drug abuse as a public health crisis and not a policing issue.

Yet, the police, courts, and prisons do not exist in a vacuum. Systemic discrimination also means overrepresentation of minorities in other Canadian frontline institutions, including public school dropouts and child protection cases, often fostering later emergence of criminal activity.

As Addo suggests, changing justice policy and institutional structure alone will not be enough; transformations related to "other norms that work (both overtly and covertly) to reinforce and perpetuate racial inequality within our social, economic, and political systems" are also needed. ■

ÉDITORIAL

NANCY WRIGHT
Rédactrice en chef, *Actualités justice*

Bien que ce numéro d'*Actualités justice* contienne une variété de sujets, chaque article offre un aperçu du lien justice sociale - justice pénale. Marc Addo passe au crible les rapports/commissions officielles du Canada sur le racisme systémique envers les Noirs et les Autochtones et conclut que peu de choses concrètes ont été faites, outre des études. Par exemple, l'appel lancé par la Commission de vérité et réconciliation, pour mettre fin à la surreprésentation des Autochtones en détention et pour les sanctions communautaires ciblant les causes sous-jacentes de la délinquance, n'a pas été mis en œuvre. John Winterdyk considère que le racisme est un terme ambigu au Canada et note des préoccupations similaires et l'absence d'initiatives réussies dans d'autres pays, même lorsque le racisme systémique est bien documenté.

Stefan Horodeckyj explore les graves écueils du système carcéral et déplore un manque d'attention portée aux composantes 'justice sociale' et 'consolidation de la paix' de la justice réparatrice au Canada. Nathan Afilalo rend compte de deux tables rondes organisées par l'Institut canadien d'administration de la justice, dont l'une porte sur la sous-représentation des minorités dans la sélection du jury. Sarah Borbolla Garcés traite de la surreprésentation des minorités visibles dans les condamnations liées à la drogue et de la façon dont la stigmatisation post-libération réduit davantage les possibilités socio-économiques.

Au Canada, la discrimination passe au-delà de la « race ». Selon le Comité sénatorial permanent des droits de la personne (2019), « les politiques du SCC créent souvent de la discrimination envers certaines personnes parce qu'elles sont autochtones ou en raison de leur race, de leur sexe, de leur handicap, de leur état de santé mentale, de leur ethnicité, de leur religion, de leur âge, de leur langue, de leur orientation sexuelle et de leur identité sexuelle ». L'incursion de Brandi Chrismas dans la pensée critique illustre que la pauvreté et l'exclusion sociale peuvent préparer le terrain à des gestes criminels. Chanel Blais révèle à peu près la même chose, mais dans le contexte des opérations d'infiltration « Mr Big ». Amanda Sherry examine comment un livre d'histoires écrites par l'expert en justice Doug Heckbert remet en question la légitimité des exigences de l'*actus reus* et de la *mens rea*.

Samantha Barlage montre que la violence domestique à l'égard des femmes est en hausse au Canada, avec une femme ou une fille tuée tous les 2,5 jours en moyenne en 2018. En outre, la plupart des femmes purgeant une peine fédérale (globalement, 42 % d'entre elles sont autochtones, mais ce chiffre monte jusqu'à 66 % dans les Prairies) sont en proie : pauvreté, itinérance, trauma, abus, problèmes de santé mentale, toxicomanie, faible niveau d'éducation et purgent une peine pour une infraction non violente. La critique ouverte du système canadien de justice pénale a également suscité d'autres réactions, comme des appels à traiter la toxicomanie comme une crise de santé publique et non un problème de sécurité publique.

La police, les tribunaux et les prisons n'existent pas en vase clos. La discrimination systémique se traduit également par une surreprésentation des minorités au sein d'autres institutions canadiennes de première ligne. Il suffit de penser aux abandons scolaires et aux cas de protection de l'enfance, contextes propices à l'activité criminelle. Comme le suggère Addo, pour changer les choses, il ne suffira pas de modifier les politiques de justice et la structure institutionnelle; des transformations liées à d'autres normes qui fonctionnent (ouvertement et secrètement) à perpétuer l'inégalité raciale dans nos systèmes sociaux, économiques et politiques sont également nécessaires. ■

CALL FOR PAPERS

World Congress on Probation and Parole 2022

No One Left Behind: Building Community Capacity

September 28 - October 1, 2022 **Delta Hotel - Ottawa (Ontario) Canada**

CALL FOR PAPERS DEADLINE: December 15, 2021

Please submit your proposals to CCJA by email (ccja-acjp@rogers.com), fax (+1 (613) 725-3720), or post (320 Parkdale Avenue, Suite #101, Ottawa (Ontario) Canada K1Y 4X9).

You are cordially invited to submit an abstract for a presentation at the 5th World Congress on Probation and Parole!

This international event is being organized by the Canadian Criminal Justice Association in collaboration with the Parole Board of Canada, Correctional Service Canada, Public Safety Canada, and the Royal Canadian Mounted Police. It will be held at the Delta Hotel in Ottawa, Ontario, Canada. Consider attending this networking opportunity to learn about the latest in probation and parole around the world.

The theme of the event will be "**No One Left Behind: Building Community Capacity**". This Congress will explore the challenges, opportunities and success stories involved in building community capacity and sustaining partnerships that support successful reintegration for diverse groups of offenders in an evolving global environment.

Academics, researchers, students, community-based organizations, practitioners, and policy leaders are invited to submit presentation proposals relating to one or more of the sub-themes listed below.
Please note that elements within the sub-themes are not exclusive. Other subjects can be added if they are connected to the main theme of "No One Left Behind: Building Community Capacity".

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APPEL DE COMMUNICATION

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Ne laisser personne de côté : renforcer la capacité communautaire

28 septembre au 1er octobre 2022 — **Delta Hotel - Ottawa (Ontario) Canada**

DATE LIMITE DE SOUMISSION : 15 décembre 2021

Veuillez présenter votre proposition à l'ACJP par courriel (ccja- acjp@rogers.com), par télécopieur (+1 613 725 3720) ou par la poste (320, avenue Parkdale, bureau 101, Ottawa (Ontario) Canada K1Y 4X9).

Vous êtes cordialement invités à présenter un résumé de présentation dans le cadre du 5e Congrès mondial sur la probation et la libération conditionnelle!

Cet évènement international est organisé par l'Association canadienne de justice pénale, en collaboration avec la Commission des libérations conditionnelles du Canada, Service correctionnel Canada, Sécurité publique Canada, et la Gendarmerie royale du Canada. L'évènement se tiendra au Delta Hotel, à Ottawa, en Ontario, au Canada. Pensez à participer à cette occasion de réseautage pour en savoir davantage sur les dernières avancées en matière de probation et de libération conditionnelle partout dans le monde.

Le thème de l'évènement sera « **Ne laisser personne de côté : renforcer la capacité communautaire** ». Dans le cadre de ce Congrès, on abordera les défis, les possibilités et les réussites touchant le renforcement de la capacité communautaire et le maintien de partenariats qui favorisent la réintégration efficace de divers groupes de délinquants dans un contexte mondial en évolution.

Des universitaires, des chercheurs, des étudiants, des organisations communautaires, des intervenants et des dirigeants politiques sont invités à présenter des propositions de présentation liée à l'un ou à plusieurs des sous-thèmes énumérés plus bas. Veuillez noter que les éléments des sous-thèmes ne sont pas exclusifs. D'autres sujets peuvent être ajoutés s'ils sont liés au thème principal « Ne laisser personne de côté : renforcer la capacité communautaire ».

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- Femmes délinquantes
- Délinquants radicalisés
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Organisé par l'Association canadienne de justice pénale en collaboration avec la Commission des libérations conditionnelles du Canada, Service correctionnel Canada, Sécurité publique Canada, et la Gendarmerie royale du Canada.

Highlights and Commentary on the Inventory of Official Reports and Commissions on Racism in the Canadian Criminal Justice System

MARK ADDO

INTRODUCTION

The Ongoing Saga of Racism Within the Canadian Criminal Justice System – Is There a Way Out?

DR. JOHN WINTERDYK, Criminologist, Mount Royal University (AB)

It is commonly believed that (systematic) racism has existed forever. However, according to various sources, the term was only first used by the controversial American General Richard Henry Pratt in 1902 when he expressed his 'racist' views of the American native population. He is perhaps best remembered for coining the phrase: "Kill the Indian…save the man". Today, the terms racists and racism are omnipresent but remain among the more ambiguous words in the English language. Racism is a social construct (like hate crime &, more recently, Coronavirus lockdown laws) and while appearing obvious, it is far from it. The definition of (systemic) racism and racists has evolved, but the terms are also relative. For example, during the colonial invasion of Canada during the 1600s, European colonists used the term 'race' to label Canada's Native people. However, the concept of racism has until recently not been common parlance. In the 1970s, for example, we used the term 'prejudice' whose dictionary definition included such descriptors as discrimination, intolerance, and antagonism directed against someone of different ethnic or racial background premised on the belief that one's own race is superior.

This article by Mr. Addo presents a thought-provoking commentary on the list of official reports and Commissions on racism in Canada. Between 1989 when the first Royal Commission spotlighted systemic racism within the Canadian Criminal Justice System (CJS), seven subsequent reports and a Commission report that (systemic) racism (focusing only on Indigenous and Blacks) was and continues to be a problem in the CJS. Addo provides concise summaries of each of the reports and Royal Commission only to conclude that despite their collective voice, which repeatedly speaks to the ongoing issue of racism in the CJS, truly little has been accomplished as a result.

Although not the objective of his article, it is interesting to note that Addo's findings and conclusions parallel the concerns found in countries such as India, Jordan, Australia, and the United States where (systemic) racism is well documented and their various formal and informal initiatives have similarly not fared well. Addo's article should serve as a call for a paradigm shift in how we manage this blight on humanity. The article offers some broad yet insightful suggestions as to how we might (finally) begin to effectively address the issue of racism and prejudice within Canadian society and arguably internationally.

BY MARK ADDO

BACKGROUND

Systemic racism exists within the Canadian criminal justice system. It is acknowledged through the various official reports and commissions throughout the past years from 1989 to the present. Often, the call to improve the criminal justice system and to make it more equitable leads nowhere.

The recording of the death of George Floyd on 25 May 2020 in Minnesota, US, made people and various institutions acknowledge the prevalence of anti-Black racism in society. In the video of George Floyd's death, he called for his mother and pleaded to breathe. Officer Derek Chauvin, who held his knee on George Floyd's throat, did not budge or allow him to breathe; he treated George Floyd as an animal and not as a human being. Unfortunately, for most Black people, the death was the loss of another Black man at a police officer's hands. The scenario occurs far too often, but the recording of George Floyd's death, the shutdown of sports, and total lockdown due to COVID-19 all contributed in May 2020 to widespread public outrage. George Floyd's death was the spark needed to launch protests across the world against anti-Black racism and police killings of Black people. The protests became a worldwide affair. The topic of anti-Black racism and police killings of Black people spilled over into Canada.

Canada is among those countries that had to reflect on the treatment of Black people within its criminal justice system. Additionally, Canada's federal, provincial/territorial and municipal governments and corporations, institutions, and organizations were forced to review and analyze their structures and operations to determine if systematic discrimination or anti-Black racism existed and persisted.

Based on the renewed awareness of the need to identify and eliminate systemic racism, the Canadian Criminal Justice Association acted by creating the Subcommittee on Racism in the Canadian Criminal Justice System (SRCCJS). The Subcommittee aimed to identify the impacts and influences of racism within the Canadian criminal justice system. The Subcommittee defined systemic racism as "actions/inactions and attitudes embedded in policies, institutional practices, and other norms that work (both overtly and covertly) to reinforce and perpetuate racial inequality within our social, economic, and political systems." Evidence was gathered through Canadian official reports and commissions on racism, to help identify the state of systemic racism within the Canadian criminal justice system.[1]

OBJECTIVE

This paper will highlight the findings of some of the official reports and commissions on racism within the Canadian criminal justice system over the years ranging from 1989 to the present. Most of the reports and commissions expressly acknowledge the existence of systemic racism within the Canadian criminal justice system. A majority of the reports and commissions were commissioned by provincial governments such as Manitoba, Saskatchewan, Ontario and Nova Scotia. Some municipalities such as Ottawa and Toronto commissioned reports into street checks and police stops. The Ontario Human Rights Commission was the author of several reports as well. Overall, there are several extensive reports and commissions that addressed systemic racism within the Canadian criminal justice system.

ROYAL COMMISSION ON THE DONALD MARSHAL JR. PROSECUTION, 1989

In Nova Scotia, Donald Marshall, Jr. was unfairly arrested, imprisoned and wrongly convicted for murder in 1971 and sentenced to life in prison.[2] He was acquitted in 1983 by the Court of Appeal.[3] The Government of Nova Scotia commissioned an Inquiry into Donald Marshall Jr.'s prosecution on 28 October 1986 to examine the case from initial investigation through trial, reinvestigation and appeal.[4] The Commissioners concluded that Donald Marshall Jr. did not kill Sandy Seale, and that he would not have been convicted and experience a miscarriage of justice if he were White.[5] The Royal Commission noted that what Donald Marshall experienced was due in part to him being a Native.[6]

The Commissioners also concluded that the police officers who investigated the crime scene, the defence counsel and Crown Attorneys all involved in the prosecution of Marshall Jr. were unprofessional and incompetent in carrying out their duties. The officers did not follow standard procedure, including identification, and did not seal off the crime scene upon their arrival, nor did they search the area or question witnesses.[7] The subsequent

investigation conducted by the Sergeant of Detectives, John MacIntyre, was inadequate and conducted in haste. Sergeant MacIntyre quickly decided that Marshall had stabbed Seale in the course of an argument, despite no evidence to support that conclusion.[8] Marshall attempted to explain the events that led to Seale's death, but the Sergeant found him to be a trouble maker. The Commissioners concluded that the Sergeant did not believe Indians to be as worthy as Whites.[9] Sargent MacIntyre gathered evidence that only supported his conclusion. The Royal Commission also identified Marshall's defence counsel as being partly responsible for the miscarriage of justice because they failed to provide an adequate standard of professional representation for their client. The defence counsel did not conduct an independent investigation, nor did they interview any Crown witnesses, and failed to ask for disclosure of the Crown's case against their client.[10]

The Royal Commission showed that the criminal justice system does not operate fairly or equitably for Natives. Donald Marshall was convicted at the initial trial. Ten days after his conviction, Jimmy MacNeil, another witness at the crime scene, came forward and informed the police that he saw a different person, Ebsary, kill Seale rather than Marshall.[11] An RCMP officer was assigned to investigate MacNeil's revelation, but the officer did not demand to see the entire police file on the case from the Sydney City Police Department, nor interview Ebsary, Marshall, Chant or Pratico—the latter two being eyewitnesses that allegedly saw Marshall flee after a robbery.[12] The RCMP officer closed his review of the case and concluded that Marshall had stabbed Seale. The RCMP officer's hasty review and conclusion denote that he did not seriously consider MacNeil's statement and its significance for Marshall, who was convicted and on the verge of serving a life sentence. Marshall appealed his conviction, but MacNeil's revelation about being at the crime scene and seeing the stabbing occur was not disclosed to either Marshall's counsel or Crown.[13] The list of mistakes and errors that occurred in this case is very long.

The Royal Commissioners believed that if Marshall had been White, the officers and lawyers involved in the case would likely have been more professional in carrying out their duties. Such a conclusion strongly suggests that the criminal justice system operates differently for Natives, Blacks and other visible minorities as compared to Whites. One has to wonder if the officers and lawyers involved in this case viewed White lives as more worthy than Natives. The Royal Commission certainly showed that a form of bias existed towards Natives.

REPORT OF THE ADVISOR ON RACE RELATIONS TO THE PREMIER OF ONTARIO, BOB RAE, 1992

A series of incidents in 1992 led to another inquiry into systemic racism within the Canadian criminal justice system. In 1992, Ontario Premier Bob Rae asked Stephen Lewis, his advisor on race relations, to provide a report on race relations in Ontario. Premier Bob Rae asked for a report because a Toronto police officer shot and killed Raymond Lawrence, a Black 22-year-old man.[14] The police claimed that Lawrence was selling drugs and pulled a knife when he was chased.[15] Raymond Lawrence's death led to a protest which turned into a riot on Yonge Street.[16] The incident became known as the Yonge Street Riots.[17] Lawrence was the fourth Black suspect killed in such a manner just within the years covered by the inquiry. The death of Lawrence and ensuing riot led Bob Rae to state that racism was a systemic problem that required further investigation.[18]

The Report of the Advisor on Race Relations to the Premier of Ontario, Bob Rae, identified anti-Black racism to be the main focus of the Report.[19] The Report noted that Blacks and other minorities believed that the criminal justice system treated them unfairly and worse than White people. The Report said that racism, though prevalent and pervasive, affects certain minorities more than others. Black people were found to be disproportionately impacted and affected by racism as compared to other visible minorities. Stephen Lewis stated that "just as the soothing balm of 'multiculturalism' cannot mask racism, so racism cannot mask its primary target".[20] The Report recommended that the government "established an Inquiry into race relations and the criminal justice system, with broad terms of reference, incorporating Crown Attorneys, Courts Administration, the Judiciary, Adult and Youth correctional facilities, Community Policing, probation and parole services."[21]

REPORT OF THE COMMISSION ON SYSTEMIC RACISM IN THE ONTARIO CRIMINAL JUSTICE SYSTEM, 1995

Stephen Lewis' recommendation to establish an Inquiry into race relations in the criminal justice system led to the Commission on Systemic Racism in the Ontario Criminal Justice System. The Commission produced a Final Report on Systemic Racism in the Ontario Criminal Justice System on 19 December 1995. The Commission focused on anti-Black racism and the experiences of all racial minority communities by examining practices, procedures and policies as they relate to the police, courts and correctional institutions. The Report defined systemic racism to be social processes that produce racial inequality in decisions about people and in the treatment they receive.[22] The Report noted that racialization exists in Canada through people being classified into racial groups by reference to their signs of origin, such as skin colour, language, or place of birth.[23] Others use the classification of people's signs of origin, such as skin colour or place of birth, to judge their character, skills, talents and capacity as Canadians. The Report acknowledged that when racialization is placed within the Canadian context, it can be seen to have an adverse effect on racialized people, but that effect may be unrecognized by the White majority which does not experience the adverse effect of racialization.[24] For example, the Report indicated that as it relates to admissions to Ontario prisons for the period of 1986-1993, most prisoners were White, but Black men, women, and male youths were massively over-represented.[25] Indigenous men, women, and youths were also overrepresented in provincial prisons, but not to the same extent as Black people.[26] The Report noted that other racialized groups were not generally over-represented.[27]

In regard to sentencing, White people were sentenced more leniently than Black people. Convicted White offenders with criminal records, even when these were more serious than those of Blacks, received leniency from the sentencing judges.[28] A vivid example is the disparity between White and Black people sentenced to prison for drug offences; 55% of Black compared to only 36% of White convicted persons were sentenced to prison.[29] The Report stated that Black men were more likely to be stopped by the police, at a rate of 43% over the two years studied, compared to 25% for Whites and 19% for Chinese male residents.[30] Also, from 1978 to 1995, 16 Black civilians were shot by on-duty-police officers in Ontario.[31] Ten of those sixteen incidents were fatal. The shootings of Black people along with the circumstances of the shootings, led Black people to believe that they were more vulnerable to police violence.[32]

The Report on systemic racism in Ontario acknowledges the existence of systemic racism within the criminal justice system. The Report stated that the only way to eliminate systemic racism from Ontario's criminal justice system was through a collective effort from all members and parties. The Report also stated that an aggressive commitment was required so that racial equality can become a reality. Despite these events in the 1980s and 1990s, and the recommendation to make a concerted effort to combat and eradicate systemic racism within the criminal justice system, the Canadian criminal justice system remains largely unchanged today.

DEATHS AND INJURIES OF ABORIGINALS IN CUSTODY AND/OR WITH POLICE INVOLVEMENT. AN INITIAL SURVEY OF INFORMATION AND INCIDENTS IN BRITISH COLUMBIA, SASKATCHEWAN, MANITOBA AND ONTARIO PRELIMINARY REPORT, 2003

Reports and inquiries show that Indigenous people have been subjected to extreme use of force by the police. Fatal encounters with police officers have been depicted in inquiries such as the "Report of the Aboriginal Justice Inquiry in Manitoba (1999)", "Aboriginals deaths and injuries in custody and/or with police involvement: …, Preliminary Report (2003)", and the "Ipperwash Inquiry (2007)". All of these Inquiries looked into cases of Indigenous victims who died or were severely injured in police custody or in encounters with police. British Columbia has an extensive list of Indigenous people who died in police custody.[33] Some of the British Columbia victims who were killed while in police custody are as follows: Thomas Prince, Clarence Jack, Frank Bell, Frank Paul, Anthony James Dawson, Paul Alphonse, and Clayton Alvin Willey.[34]

In Saskatchewan, there have been several incidents of Indigenous people who froze to death after encounters with police officers: Neil Stonechild, Lloyd Dustyhorn, Rodney Naistus and Lawrence Wegner.[35] Manitoba, Alberta, Ontario and Yukon also recorded deaths of Indigenous people during

encounters with police or while in police custody. The deaths of Indigenous people under such circumstances show that their distrust and fear of police officers are warranted because their lives have not been valued and protected. These examples depict the systemic racism that exists within the criminal justice system. While the police are required to protect civilians, they have, in fact, become assailants of Indigenous individuals.

THE IPPERWASH INQUIRY REPORT/ ABORIGINALS AND THE CRIMINAL JUSTICE SYSTEM, 2007

The experience of Indigenous people with the criminal justice system tends to be similar to that of Black people. For example, similar to the Yonge Street Riots, the Ipperwash Inquiry Report was commissioned to look into the events surrounding the death of Anthony O'Brien (Dudley) George, an Indigenous person who was shot and killed by an Ontario Provincial Police officer during a protest by First Nations at Ipperwash Provincial Park in 1995.[36] The Ipperwash Inquiry Report looked into Indigenous peoples and the Criminal Justice System, with particular focus on Indigenous people in Ontario in 2007.[37]

The Report identified Indigenous people overrepresentation in the criminal justice system as a crisis in the Canadian criminal justice system.[38] Specifically, Indigenous youths were overrepresented in Ontario correctional facilities.[39] It concluded that their experience of colonialism is the best explanation for Indigenous people overrepresentation in the criminal justice system. The Report also identified over-policing, which refers to the practice of police targeting people of particular ethnic or racial backgrounds or people who live in a particular neighbourhood, as another reason for the overrepresentation.[40]

Strangely, the Report also stated that Indigenous people were under-policed, judging by the fact that they were overrepresented in the criminal justice system as victims. Indigenous people were viewed as less worthy victims by the police. Their requests for help and assistance were regularly ignored or downplayed.[41] Hence, both under-policing and over-policing have led Indigenous people to distrust the police. As a result, the experience of Indigenous people in the criminal justice system varies drastically from that of non-Indigenous.

THE TRUTH AND RECONICIALIATION COMMISSION OF CANADA FINAL REPORT, 2015

The Truth and Reconciliation Commission (TRC) further highlights the Indigenous people's experience in Canada. The TRC addressed the injustices and harm directly and indirectly experienced by Indigenous people due to the legacy of the Indian residential schools. Indigenous students were forcibly taken from their parents and placed in residentials schools.[42] The residential school mistreated, malnourished, abused and forced Indigenous students to assimilate into British society.[43] The TRC stated that the impact of colonialism and generational trauma produced by the residential schools continues today. For example, within the criminal justice system, Indigenous people are disproportionately imprisoned and victimized. The TRC attributes such an outcome to the fact that Indigenous students were "denied an environment of positive parenting, worthy community leaders, and a positive sense of identity and self-worth".[44] Additionally, residential schools may likely be the source of intense racism against Indigenous people permeating Canada.[45]

The TRC called upon the federal, provincial, and territorial governments to take measures to eliminate the overrepresentation of Indigenous adults and youths in custody and "to provide sufficient funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Indigenous offenders and respond to the underlying causes of offending".[46] By making these recommendations, the TRC acknowledged that Indigenous people face racism within the Canadian criminal system. The TRC hoped its recommendations would provide a solution. When various commissions and inquiries come to the same conclusion that there is systemic racism within the Canadian criminal justice system, people and institutions should take notice.

REPORT OF THE INDEPENDENT STREET CHECKS REVIEW BY THE HONOURABLE MICHAEL H. TULLOCH, 2018

Another major report that sheds light on systemic racism within the Canadian criminal justice system is the Report of the Independent Street Checks Review by the Honourable Michael H. Tulloch, judge of the Court of Appeal for Ontario. Justice Tulloch was appointed by the Government of Ontario to lead an independent review of Regulation 58/16

(O. Reg. 58/16) and its implementation. Regulation 58/16 was introduced in 2016 and authorized the collection of identifying information by police in certain circumstances.[47] The collection practice is commonly known as "street checks" or "carding".[48] Justice Tulloch reviewed Regulation 58/16 to ensure that "the Regulation reflected the government's goal of ensuring that police-public relations are consistent, bias free and done in a way that promotes public confidence and protects human rights".[49] Justice Tulloch noted in the Report that the practice of street checks was once an effective tool intended to gather information about people with a criminal record, people who were on probation or parole or suspected of being involved in some criminal activity.[50]

The practice was useful for tracking individuals engaged in criminality and, at times, led to new investigative leads. But the practice "evolved from targeted inquiries of people suspected of criminal activity to inquiries about people who simply looked suspicious and, eventually, to completely random inquiries".[51] The arbitrary nature of the practice led to police targeting marginalized, racialized and Indigenous people.[52] Black, Indigenous and other racialized communities saw the practice as a focused collection of their personal information irrespective of whether they had any criminal involvement. As a result, racialized groups were outraged and wanted the practice of street checks to be banned throughout Ontario because the data collected resulted from a discriminatory practice.[53] Justice Tulloch noted that despite the investigative and intelligence value of gathering information, street checks required safeguards that ensured that the practice was not applied only to marginalized, racialized and Indigenous communities.[54]

A DISPARATE IMPACT: SECOND INTERIM REPORT ON THE INQUIRY INTO RACIAL PROFILING AND RACIAL DISCRIMINATION OF BLACK PERSONS BY THE TORONTO POLICE SERVICE, 2020

This Ontario Human Rights Commission (OHRC) report, released on 10 August 2020, delivered similar results to that of Justice Tulloch. The Disparate Impact report focused on Black people's interactions and encounters with the Toronto police. The Report concluded that Black people are more likely to be arrested, charged and over-charged, struck, shot or killed by the Toronto police.[55] The Toronto Police Service (TPS) data ranging from 2013-2017 obtained by OHRC confirmed that Blacks were "subjected to a disproportionate burden of law enforcement in a way that is consistent with systemic racism and anti-Black racial bias".[56] The TPS data showed that Black communities are over-charged and over-policed.[57] The incidents ranged from low-quality discretionary charges to police use of force.[58] Again, this Report is consistent with others in identifying a systemic bias against Blacks within the criminal justice system.

CONCLUSION

The CCJA Inventory of Official Commissions and Reports dealing with Racism in the Canadian Criminal Justice System[59] which range from the 1980's to the present confirm the existence and prevalence of systemic racism within the Canadian criminal justice system. New research and commissions on racism within the criminal justice system to be undertaken in the future will likely provide a similar result. For drastic and substantial improvement to occur, it would require a collective, conscious and focused attention to the existence of systemic racism and would need all parties involved in the criminal justice system to work in unison to eradicate it. The SRCCJS's definition of systemic racism is twofold, however, which means that changes to policies and institutional practices around the Canadian CJS must be accompanied with changes to "other norms that work (both overtly and covertly) to reinforce and perpetuate racial inequality within our social, economic, and political systems". Until such focus and attention are given to acknowledging systemic racism, the future will continue to resemble the past, and the Canadian criminal justice system will not rise above its status quo. ■

NOTES

1. Please see attached "CCJA Inventory of Official Commissions and Reports dealing with Racism in the Canadian Criminal Justice System" (April 13, 2021), online (pdf): *Canadian Criminal Justice Association (CCJA)* **www.ccja-acjp.ca/pub/en/wp-content/uploads/sites/8/2021/04/CCJA-Inventory-of-Commissions-and-Reports-dealing-with-Racism-in-the-Canadian-Criminal-Justice-System.pdf**

2. Chief Justice T. Alexander Hickman, "Royal Commission on the Donald Marshall, Jr., Prosecution" (1989) at 2, online (pdf): *Nova Scotia* **novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf**

3. *Ibid*.

4. Nova Scotia Archives, "Royal Commission on the Donald Marshal Jr. Prosecution" (30 March 2021), online: *Nova Scotia* **https://archives.novascotia.ca/marshall**

5. Hickman, *supra* note 2 at 2.

6. *Ibid*.

7. *Ibid*.

8. Hickman, *supra* note 2 at 3.

9. *Ibid*.

10. Hickman, *supra* note 2 at 4.

11. *Ibid*.

12. *Ibid*.

13. *Ibid*.

14. Chantal Braganza, "How a 1992 report on racism in Ontario highlights current problems" (01 Sept 2016), online: *TVO* **www.tvo.org/article/how-a-1992-report-on-racism-in-ontario-highlights-current-problems**

15. *Ibid*.

16. Jamie Bradburn, "There's a Riot Goin' on Down Yonge Street", (11 August 2011) online: *Torontoist* **https://torontoist.com/2011/08/theres_a_riot_goin_on_down_yonge_street**

17. *Ibid*.

18. *Ibid*.

19. Stephen Lewis, "The Report of the Advisor on Race Relations to the Premier of Ontario, Bob Rae" (1992) at 2, online (pdf): *Ontario Ministry of the Attorney General* **www.siu.on.ca/pdfs/report_of_the_advisor_on_race_relations_to_the_premier_of_ontario_bob_rae.pdf**

20. *Ibid*.

21. *Ibid* at 16.

22. Margaret Gittens and David Cole, "Report of the Commission on Systemic Racism in the Ontario Criminal Justice System", (1995) at ii, online (pdf): *Commission on Systemic Racism in the Ontario Criminal Justice System* **https://collections.ola.org/mon/25005/185733.pdf**

23. *Ibid*.

24. *Ibid*.

25. *Ibid* at iii.

26. *Ibid*.

27. *Ibid*.

28. *Ibid* at vii.

29. *Ibid* at vii.

30. *Ibid*.

31. *Ibid* at x.

32. *Ibid*.

33. Nancy Hannum, "Aboriginals deaths and injuries in custody and/or with police involvement: An Initial Survey of Information and Incidents in British Columbia, Saskatchewan, Manitoba and Ontario Preliminary Report" (2003) at 4-5, online (pdf): *Report to Native Courtworker and Counselling Association of British Columbia* **https://nccabc.ca/wp-content/uploads/2015/02/nccabc_aboriginaldeathsincustody.pdf**

34. *Ibid*.

35. *Ibid* at 6.

36. "The Ipperwash Inquiry Report" (21 June, 2013), online: *Government of Ontario* **www.ontario.ca/page/ipperwash-inquiry-report**

37. Jonathan Rudin, "Aboriginals and the Criminal Justice System – part of Ipperwash inquiry" (2007) at 1, online (pdf): *Ontario Ministry of the Attorney General* **www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf**

38. *Ibid*.

39. *Ibid*.

40. *Ibid*.

41. *Ibid*.

42. "Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada." (2015) at 37, online (pdf): *Truth and Reconciliation Commission of Canada* **www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf**

43. *Ibid*.

44. *Ibid* at 143.

45. *Ibid*.

46. "Truth and Reconciliation Commission of Canada: Call to Action" (2012) at 3, online (pdf): *Truth and Reconciliation Commission of Canada* **www.trc.ca/assets/pdf/Calls_to_Action_English2.pdf**

47. Honourable Michael H. Tulloch, "Report of the Independent Street Checks Review by the Honourable Michael H. Tulloch" (11 Dec 2018), *Ontario Ministry of Attorney General, Solicitor General* **www.mcscs.jus.gov.on.ca/english/Policing/StreetChecks/ReportIndependentStreetChecksReview2018.html#part_I**

48. *Ibid*.

49. *Ibid*.

50. *Ibid*.

51. *Ibid*.

52. *Ibid*.

53. *Ibid*.

54. *Ibid*.

55. "A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service" (10 August 2020), online: *Ontario Human Rights Commission* **www.ohrc.on.ca/en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black**

56. *Ibid*.

57. *Ibid*.

58. *Ibid*.

59. CCJA, *supra* note 1.

RÉSUMÉ

Highlights and Commentary on the Inventory of Official Reports and Commissions on Racism in the Canadian Criminal Justice System

MARK ADDO

Introduction par le Dr John Winterdyk (Criminologue), Université Mount Royal, Calgary (AB) : Dans cet article, M. Addo présente une réflexion stimulante sur la liste des rapports officiels et des commissions sur le racisme au Canada. Depuis 1989, date à laquelle la première Commission royale a mis en lumière le racisme systémique au sein du système de justice pénale canadien, les rapports officiels et les commissions ultérieures ont montré que le racisme (systémique) (axé uniquement sur les Autochtones et les Noirs) était et demeure un problème au sein du système de justice pénale. M. Addo présente un résumé concis de chacun des rapports, y compris celui de la Commission royale. Il conclut que, malgré les affirmations répétées quant au problème persistant du racisme dans le système de justice pénal canadien, très peu de choses ont été réalisées pour changer les choses. Il est intéressant de noter que, incidemment, les résultats et les conclusions de M. Addo correspondent aux préoccupations de pays tels que l'Inde, la Jordanie, l'Australie et les États-Unis, où le racisme (systémique) est bien documenté et où les diverses initiatives formelles et informelles n'ont pas donné de bons résultats. L'article de M. Addo devrait servir d'appel à un changement de paradigme dans la façon dont nous traitons avec ce fléau de l'humanité. L'auteur tente des suggestions générales, mais perspicaces sur la façon dont nous pourrions (enfin) régler efficacement la question du racisme et des préjugés au sein de la société canadienne et, sans doute, à l'échelle internationale.

The Canadian Criminal Justice System's Restorative Justice Gaining in Popularity—Attractive Alternatives to Prison/Retributive Justice

STEFAN HORODECKYJ
HBA, BEd, JD

It is increasingly clear that the prison system in Canada, which is expensive to operate, has several major pitfalls, including overcrowding, substance abuse and mental health issues with inmates, and the disproportionate number of Indigenous prisoners. Restorative justice (RJ) models and associated programs, in the view of many criminologists, scholars and practitioners, offer an effective and cost-efficient alternative to the current prison system in Canada for certain crimes. RJ programs have been operating for over four decades in Canada to varying degrees in some of Canadian prisons and in the supervision of offenders in the community. A significant body of research shows that, where applied, RJ programs often provide healing and satisfy many of the needs of victims, offenders, and community stakeholders. Canada has successfully embraced Restorative Justice as an effective way to prevent recidivism given certain types of crime. Indigenous-based Restorative Justice traditionally aimed not only to address the restoration of the victim and individual offender but is also part of social justice and peacebuilding. Given its potential for crime circumvention, this aspect of Restorative Justice deserves more study.

According to the literature and personal anecdotes from prisoners, ex-prisoners and professionals who work with the former groups, prisoners experience a paucity of positive emotions like remorse, penance, and contrition. Disturbingly, most emotions experienced by prisoners are negative. These can include, for example, deprivation, tension, frustration, anger, anxiety, loneliness, fear, depression, stigmatization, and despair (Solomon, March 2017; Jones, August 2018). Such feelings arise from and are, to a great extent, indicators of the serious pitfalls inherent to prisons.

MAJOR PITFALLS OF PRISONS

- prisons are retributive/punitive in nature and focus primarily on security and restricting the freedom of prisoners. They do not have a highly corrective impact because there is a lack of rehabilitative programs in prisons, especially for female prisoners/inmates and for aging inmates (i.e., 50 years and older) (Coyle, Britannica, 2014), and those that do exist are optional.
- recidivism rates are high; for example, 35% for males in federal penitentiaries (Statistics Canada, 2019) and over 30%, for males in provincial and territorial prisons–e.g., Ontario males = 37% (MCSCS, 2019) and Manitoba males = 33% (Berrily, 2019). The recidivism rate for Indigenous males is much higher, "as high as 70% for Indigenous men in the Prairie region" (Zinger, 2020). The proportion of Indigenous people, who represent roughly 5% of the Canadian population, in federal custody is higher than ever before: 30.04%... up from roughly 25% in 2016 (Zinger, 2020).
- overcrowding is a serious problem (Ling, J. 2019).

- according to a study conducted at McMaster University, “Half of Canada’s prisoners were abused as children” (Craggs, 2019).
- most inmates have some form of mental health issue (Solomon, 3 March 2017); for example, in 2015, 44.1% of prisoners, males and females in Canadian penitentiaries suffered from antisocial personality disorder (Correctional Service Canada, 2015). Combined with the other pitfalls of prisons, this poses an extreme challenge for corrections (Brink, 2018).
- drug use is an overwhelmingly serious problem among inmates (Bingham, 2018); in 2015, 70% of prisoners (males and females) in Canadian penitentiaries had alcohol/drug-related issues (Correctional Service Canada, 2015).
- prisons have long been described as ‘universities of crime’ for ‘new’ prisoners (e.g., Horodeckyj, 2012) and, more recently, “criminologists have begun quietly referring to Canada’s prisons and jails as the country’s ‘new residential schools’” (Maclean’s, 18 Feb. 2016).
- prisons have long been described as ‘concrete wombs’ through institutionalization, which makes reintegration into society more difficult (Watterson, 1996).
- the prison culture is given by the institutional structure, which tends to create an underlying adversarial environment that is typically reflected in the degree of antipathy between the prisoners and their ‘keeper’ (Ling, 2019).
- prisons take a toll not only on the prisoner, but also on the prisoner’s family (e.g., alienation from family members and loss of a source of family income.
- the cost of incarceration is high; over $120,000. per inmate/year in federal penitentiaries and almost $85,000. per inmate/year in provincial/territorial jails (Statistics Canada, 2019).

From the author’s legal-informed perspective and that of many criminologists and scholars, a growing need for an alternative to prison clearly exists.

RESTORATIVE JUSTICE PROCESSES AS REALISTIC, EFFECTIVE, AND COST-EFFICIENT ALTERNATIVES TO IMPRISONMENT

“Restorative justice redefines the offenders' “needs” from a fair trial and just punishment to the need to take responsibility and to replace punishment, specifically imprisonment, with consequences which can lead to growth and change in a positive direction” (Department of Justice Canada, 2018). In fact, in the view of many experts too numerous to list here, Restorative Justice can offer a realistic, more effective and more cost-efficient alternative to prisons; however, it is important to note that restorative justice is not a panacea and cannot apply to all crimes.

Restorative Justice, over the years, has been described in slightly different ways in the literature and by professionals working in the field, but the ‘grandfather’ of RJ, Professor Howard Zehr, offers a clear summary: “restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense, (*victim, offender and community members*) to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible” (Zehr, 2002).

It is noteworthy that Restorative Justice has been practiced by Indigenous peoples in Canada for hundreds of years and that restorative justice sentencing principles and restorative program options were incorporated into the Criminal *Code of Canada (CCC)* in 1995. Section 717 of the *CCC* deals with Alternative Measures (diversion programs for offenders); section 718 deals with the Purpose of Sentencing; and section 718.2 deals with Sentencing Principles (*CCC*, 1985). These sections of the *CCC* give the Crown prosecutor and the Judge legal parameters within which to employ restorative practices. Also, the accused and the victim have certain statutory legal rights under the *CCC* regarding the implementation of restorative procedures and practices.

SOME OF THE PRINCIPLE RESTORATIVE JUSTICE MODELS AND PROGRAMS IN CANADA

There are several restorative justice models and associated programs in Canada (Justice, 2017), for example:

Circle model (sometimes referred to as ‘Healing Circle Model’) constitutes a traditional practice of Indigenous Peoples and, since the 1970s, by Mennonite communities in Canada. The rationale for the use of the model stems from the belief that whenever practical, the offender, victim, and their respective families and community stakeholders should be part of the solution for settlement of disputes between individuals. Meeting in a circle formation - a peaceful, respectful, and inclusive setting where information, ideas and feelings are shared - offers a most equitable and just way to deal with crime (i.e. repairing broken

relationships), as demonstrated by Indigenous and Mennonite communities.

Circle of Support and Accountability (CoSA) restorative justice programs for sexual offenders established in 1994 in Hamilton (ON) and today can be found across Canada (Pranis, Stuart, Wedge, 2003).

Victim-offender conferencing (dialogue/mediation) model, primarily involving victim, offender, and trained facilitator, but also may include family members, friends, and community stakeholders (Zehr et al., 2015).

Victim–Offender Reconciliation Program, or ***VORP***, had its beginnings in 1974 in the City of Elmira, Ontario, as a result of *R. v. Kelly et al.* (Lockhart & Zammit, 2005). This case involved two convicted teenagers caught vandalizing homes and other personal property. The essence of VORP is the victim and offender meeting, the addressing of victims' needs at the presentencing or sentencing or post sentencing stage and creating a realistic plan to meet these needs. VORP currently operates in several provinces, such as Ontario, Alberta, BC, and Manitoba; a more expansive VORP – *the Collaborative Justice Program (CJP)* – was initiated September 1, 1998 as a demonstration project in Ottawa. The Program was initially sponsored by the Church Council on Justice and Corrections (CCJC)" (CJP, 2020).

> The initial aim of the Project was to demonstrate how a restorative approach can deliver more satisfying justice to victims, the accused and the community in cases of serious crime. Today, CJP's mandate has broadened to include less serious cases and cases involving youth" (Daubney, 2020).

"Though the Program's priority will always be the more serious cases, CJP has evolved over the past 21 years to allow the acceptance of post-charge/ pre-sentence cases, adult and youth, regardless of seriousness" (CJP, 2019).

Regarding the effectiveness of VORP (Dept. of Justice, 2018), most research findings worldwide indicate that that while only about half of all referrals by the court end up in meetings between the offender and the victim, nearly all the meetings result in agreement. Also, unlike non-mediated restitution contracts, most (80-90%) of these agreements (i.e., conditions) are fulfilled by the parties (Zehr et al., 2015; Zehr, 1990).

Victim-Offender Conferencing (Dialogue/Mediation) Programs for Serious Offences Against the Person have been used in the last three decades in Canada for such offences as aggravated assault, and sexual assault—including rape, attempted murder, manslaughter, and murder. These programs have existed since 1992 and have operated in all of Canada's 43 penitentiaries. The offender, victim and a trained facilitator/mediator are always included in this type of restorative justice program. As well, in certain programs, family members and friends of the victim or the offender can also choose to be present for support of their loved one. The victim and the offender clearly must be psychologically ready for the program, and the conferencing can produce significant emotional healing and reconciliation.

Specialized Problem - Solving Courts Model focus on one type offence or offender. The most common problem-solving programs in Canada are Drug Treatment Courts, Mental Health Courts, Domestic Violence Courts, and '*Gladue*' Courts.

Drug Treatment Court programs (DTC) are the most common in Canada and were founded in Toronto, in 1998, by the late Justice Paul Bentley. These court programs now also operate in other cities, including Durham, Ottawa, London, Vancouver, Edmonton, Calgary, and Winnipeg. The DTC model offers a unique substance abuse intervention program operationalized within the criminal justice system. It provides judicially supervised treatment in lieu of imprisonment in cases where the criminal activity is related to a substance abuse problem.

Drug Treatment Court is available for offences such as drug possession, drug use, non-commercial trafficking, and property offences such as theft to support addiction, among others. To set the DTC process in motion, the accused must first plead guilty to the charge(s) and then apply to enter the program. Once the accused's application is accepted by the Crown Attorney, this former is placed on bail (i.e., Judicial Interim Release - with *inter alia*, the condition to attend and participate in the DTC program). If they fail to comply with the expectations of the program, they are reprimanded or even expelled from the program. Those who successfully complete the

DTC program, however, will receive a judgement of a non-custodial sentence, such as probation. The effectiveness of the DTC program is evidenced by testimonials of participants who successfully completed the program and by associated staff members. According to both of these groups, many participants in the DTC reduced their substance abuse or completely ceased their drug use (Barnes, 2017). As well, it is much less expensive to have the offender live in the community while attending the DTC program than it would be if they were in prison.

RESTORATIVE JUSTICE (RJ) IS NOT A PANACEA

Some of the challenges and weaknesses of Restorative Justice can be garnered from reflections of some victims who participated in RJ programs. Research studies indicate that most victims who have participated in RJ programs are satisfied with the experience, however, there are still some victims who are not satisfied (Zehr, 2002). There is thus much debate as to whether current programs adequately address victims' needs. Also, a failure to follow up on offender compliance with the agreements/ conditions, including to sanction for non-payment of restitution by the offender, has also been noted in relation to RJ programs. RJ cannot replace the prison system and there will always be victims and offenders who choose to have their criminal cases held in regular courts. Finally, not all victims and offenders are ready for RJ programs (e.g., a victim or offender who has excessive anger, or an offender who will not admit accountability for the offence).

SOCIAL JUSTICE AND PEACEBUILDING ASPECTS OF RESTORATIVE JUSTICE

One of the aspects of restorative Justice that is less widely known and not meaningfully being put into practice in today's applications of Restorative Justice is its potential for social change. RJ processes can help identify social conditions that may have contributed to the criminalization of certain groups and may 'predispose' – through poverty for instance - certain citizens to crime. The link between poverty and crime is reflected in the fact that "Right now about 80% of those in prison come from among the approximately 11% of Canadians living below the poverty line. In past decades, as national standards for social assistance, health care and education were eviscerated, women – and particularly Indigenous and other racialized women – became and have remained Canada's fastest growing prison population" (Pate, 2020).

Unfortunately, while in theory RJ "is understood to be part of social justice and peacebuilding at the society level […,] practical application of the approach is often limited to the micro, individual level" (McCold, 1995). Therefore, "The problem with this approach is that it does not focus on the causes and consequences of wrongdoing. These are rooted in inequality, particularly in societies where this has been embedded over generations. This leaves structural causes of harm and injustice intact" (McCold, 1995), which recalls the plight of the Indigenous Peoples, among other groups including black people and women, in Canada.

"Restorative Justice proposes to alter eroded social conditions by incentivizing communities to review and change their values, norms, laws and social structures when required, and thereby reduce crime", and "the local community is an excellent vehicle to alter social inequities" (McCold, 1995). In some ways, this oft-neglected aspect of RJ evokes the memory of the French philosopher Rousseau's theory of the 'social contract', which posits that "man is born free, but everywhere in chains" (Rousseau, 1762). By this Rousseau meant that outmoded societal norms and laws have the potential to restrict the personal freedoms of citizens unnecessarily and such norms and laws should be reviewed and changed when needed, to make society fair and just. It is interesting to note that Indigenous Restorative Justice (Maori and First Nations peoples) hundreds of years ago held the belief that change is constant and people must adapt to live in harmony (Ross, 2016). "Indigenous-based restorative justice programs… produce results focused on healing individual and community harm – including the underlying harms of ongoing colonization, focused on healing individual and community harm" (Hewitt, 2016).

CONCLUDING REMARKS

It is increasingly clear that prisons in Canada have significant pitfalls, including the high monetary cost of incarceration and recidivism rates for certain crimes. There is a significant body of research to show RJ as more effective than imprisonment/ retributive justice for many offenders. RJ models and the various circle programs, victim-offender conferencing programs, and specialized courts' programs that have emerged from the models have succeeded in many cases to improve the plight of the victim, offender, and community stakeholders

in a way that prisons fail to do. A significant body of research shows that, where applied, RJ programs often provide healing and satisfy many of the needs of victims, offenders, and community stakeholders. The research also shows that, where applied, RJ programs often provide healing and satisfy many of the needs of victims, offenders, and community stakeholders. Canada is successfully embracing Restorative Justice as an effective way to prevent recidivism given certain types of crime. It is noteworthy that Indigenous-based Restorative Justice traditionally aimed not only to address the restoration of the victim and individual offender but is a 'model' for social justice and peacebuilding at the society level. Given its potential for crime circumvention, this is an aspect of Restorative Justice that warrants more study. ■

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RÉSUMÉ

The Canadian Criminal Justice System's Restorative Justice Gaining in Popularity—Attractive Alternatives to Prison/Retributive Justice

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Il est de plus en plus évident que le système carcéral canadien, dont le fonctionnement est coûteux, présente des écueils importants. Il suffit de penser à la surpopulation, aux problèmes de toxicomanie et de santé mentale des détenus, et au nombre disproportionné de prisonniers autochtones. Au Canada, de l'avis de nombreux criminologues, universitaires et praticiens, dans certains cas, les modèles de justice réparatrice et les programmes connexes offrent une alternative efficace et rentable au système carcéral. Au Canada, les programmes de justice réparatrice existent depuis plus de 40 ans. Ils sont mis en application à des degrés divers dans certaines prisons canadiennes et dans le cadre de programme de surveillance des délinquants au sein de la collectivité. De nombreuses recherches montrent que ces programmes favorisent souvent la guérison et répondent à de nombreux besoins des victimes, des délinquants et des intervenants communautaires. La justice réparatrice semble être un moyen efficace de prévenir les récidives dans certains cas. Dans la tradition autochtone, la justice réparatrice visait non seulement à aider la victime et le délinquant, mais agissait également comme principe de justice sociale et de consolidation de la paix. Cet aspect de la justice réparatrice recèle un potentiel de contournement de la criminalité et mériterait donc d'être approfondi.

Roundtables on Jury Representation and Criminal Delays

CIAJ
Canadian Institute for the Administration of Justice
Listening. Learning. Leading.

NATHAN AFILALO
Lawyer

Between December 2017 and November 2019, the Canadian Institute for the Administration of Justice (CIAJ)[1] hosted two series of roundtables, one on Indigenous and minority underrepresentation on criminal juries and another on delays in the criminal justice system.[2]

The roundtables offered a forum for members of the host province's legal community to exchange problem-solving strategies. Participants not only gained a greater understanding of how other justice stakeholders are confronting the same issue but also discussed critiques of current and future projects.[3] Recurrent solutions and issues emerged in both series despite the different foci and themes. This paper will discuss the most prominent topics raised in both.

The roundtables on delays highlighted court-based administrative strategies over a stakeholder-centric behavioural and educational approach to meet the time limits set out in *R. v. Jordan* (2016)[4]. The roundtables on jury representation focused on the need for provinces to place a higher burden of their jury selection procedure to meet ss.11 (d) (f) of the *Canadian Charter of Rights and Freedoms* (the *Charter*)[5] than the standard set out in *R. v. Kokopenace* (*Kokopenace*)[6], as well as to adopt more positive obligations to increase the presence of under-represented groups.

The Law

In an effort to reduce the considerable delays in criminal cases and address "complacency" towards them of justice stakeholders[7], the Supreme Court (SCC) in *Jordan* established a new framework for calculating whether an accused person's s.11 (b) *Charter* right to be "tried within a reasonable time" is infringed. The SCC set out presumptive ceilings beyond which the s.11 (b) is deemed to be infringed unless subject to evidence by the Crown of "exceptional circumstances".[8] In a later case, the SCC reaffirmed that under the *Jordan* framework every stakeholder in the justice system is obliged to proactively prevent those infringements.[9]

In *Kokopenace* the SCC set out the test to determine whether an accused's right, protected under ss.11(d) (f) of the *Charter*, to a representative jury has been infringed. There will be no violation if the province has made "reasonable efforts" to (1) compile the jury roll by randomly selecting jurors from lists that draw from a broad cross-section of society, and (2) issue jury notices to those so selected[10]. In *Kokopenace*, the provincial selection system produced only 4.1% of potential jurors of Indigenous identity in its rolls for the District of Kenora, where Indigenous residents comprise 30% of the population.[11] The majority of the SCC found

the province's efforts to be reasonable despite the bias of the source lists.

The Stakes: Public Confidence

While each series confronted specific legal challenges, the participants of both sought solutions to the following issue: public confidence in the criminal justice system. In *Jordan*, the SCC majority repeatedly stressed the impact of "extended delays" on the public's confidence in the justice system, the survival of which depends on that very confidence.[12] The s.11 (b) *Charter* right to be tried "within a reasonable time" protects against lengthy pre-trial detention periods for the accused and a lack of closure for victims, their families and those of the accused. When lengthy trials become the norm, so too does public frustration with and loss of confidence in the system.[13]

In *Kokopenace*, the SCC acknowledged the underrepresentation of Indigenous Peoples on juries as well as the harmful impacts of the criminal justice system upon them but did not find these to have any legal consequence under ss.11 (d) (f) of the *Charter*.[14] The threat that underrepresentation poses to public confidence in the justice system was nevertheless brought up by Justice Cromwell in dissent[15] and has been discussed in several official reports as contributing to the alienation of Indigenous People from within the justice system.[16] The problem persists, as evidenced by the controversial selection of an all-white jury in *R. v. Stanley* and the subsequent federal response eliminating peremptory challenges.[17]

Administrative Strategies to Reduce Delays

Participants in the roundtables on criminal delays discussed various strategies that could help enforce the presumptive ceiling set by the SCC. Given the high Court's sweeping indictment of the criminal justice system's "culture of complacency"[18] within[19], a wide range of strategies to enforce these ceilings have been deployed. Strategies discussed in the roundtables ranged from administrative to behavioural-based approaches aiming to make stakeholders more proactive and educational strategies to better prepare law students and young lawyers for litigation.

The majority of the participants' discussions focused on administrative strategies, which refers to the management of State and court resources to increase the judiciary's capacity of to reduce the institutional contribution to delays by processing cases in a timelier manner.[20] These strategies can be implemented pre-charge, that is, before delays are factored in but also during the pre-trial period and even during the trial, changing the way a case is processed.

Based on the roundtable discussions, "administrative strategies" appear to include efforts on the part of courts and bodies such as police departments and crown prosecutors to: 1) streamline and standardize the handling of cases between jurisdictions; 2) reorient and redistribute resources to prioritize reducing delays; and 3) promote triage and early file reviews of cases that could result in long delays.

At the time of the roundtable, the Provincial Court of Alberta provided an example of a holistic approach that included all three categories. The court called on retired and supernumerary judges to conduct pre-trial conferences in non-jury cases while triple-booking trial rooms for civil cases to free up space for criminal trials. The court adopted a more stringent triage approach, carrying out early reviews of cases, prioritizing serious offences and allocating resources as a function of case complexity and offence severity, while hiring case-flow managers and creating judicial case-flow management committees. All the while, the court implemented a principled approach by adopting standardized follow-up forms on cases and standardized review methods for prosecutors. Underlying all this was the development of an integrated provincial trial-coordination and case-scheduling system to ensure optimum use of judicial resources.

The roundtable discussions shared many different kinds of projects that met the specific needs of a given province, jurisdiction and even courthouse. Despite the variations in projects, each effort was underpinned by a strategic plan that prioritized timely justice and commitment to a holistic and adaptable approach to reducing delays. This involved setting target deadlines for cases and mechanisms to measure the efficacity of the court's strategies to reduce target deadlines.[21]

The fact these measures are rooted in the institutions that process cases makes them by definition centralized, which might account for their prominence in the discussions. While the majority in *Jordan* condemned the lethargic attitudes of judges and counsel alike, it might be difficult to change those attitudes if the system itself did not change. By transforming the workplace, administrative strategies might bolster the effect of deontological changes aimed at encouraging proactive behaviour on the part of judges and lawyers.

Low State Burden and Voluntary Avenues

While the participants in the first roundtable series (on delays) mostly sought to work with the *Jordan* framework, the participants of the series on jury representation were far more critical of the governing law.

The discussions involved changing the *Kokopenace* framework to include a higher burden and substantive obligations for the provinces in determining whether the State has fulfilled its obligation to provide a representative jury under ss.11(d) (f) of the *Charter*.2[2] Notably, in *Kokopenace*, the province was found to have met its obligation to make a "reasonable effort" even though its jury rolls excluded 3 of the 46 eligible reserves, notwithstanding the disproportionately low numbers of potential Indigenous jurors in the roll as mentioned above.[23] The majority explained that in order to satisfy the rights set out in sections 11 (d) and 11 (f) of the *Charter* a review of the random selection process used to compile the jury, and not its final composition at trial, would be necessary.[24] Representation can impact the presumption of impartiality of the selection process[25] where 1) there is the deliberate exclusion of a group and 2) the state's efforts to compile the roll are so deficient they create the appearance of partiality.[26]

The reoccurring remedy for the low state burden discussed by participants was introducing an obligation for provinces to adopt substantive and positive measures to include systematically under-represented groups. Moving from the current procedural analysis to a substantive one is an old debate.[27] The SCC has long rejected a substantive approach on a few grounds; however, the primary reasons are that a substantive approach derivates strongly from the random selection model upon which the Canadian selection process is based[28] with random selection as a guarantor of impartiality and thus inspiring public trust.[29]

While participants agreed that a substantive approach produced challenges, the enumerated or analogous grounds related to disadvantaged groups set forth in the *Charter* are no stranger to analysis.[30] One need only think of the *Gladue* principles for sentencing.[31] The well-documented issues with juror representation by various commissions and scholars[32] considered in the broader context of the disenfranchised and alienated place of Indigenous people in the justice system could enlighten us on the circumstances which require positive efforts on the part of the State in matters of representativeness.

Participants noted that positive provincial obligations do not have to be stretched to the point of providing the accused with their ideal jury composition. Rather, it would be about adopting measures to create a climate of trust and relationship building, such as education programs or the creation of volunteer models such as the "on-reserve volunteer" for coroner inquests in Kenora and Thunder Bay.[33]

A more voluntary system might also consider selecting jurors who are residents of the community where the hearing is being held to allow the community to feel involved.[34] Avenues for voluntary participation may transform the experience of communities underrepresented in jury selection from one of alienation from neglect, or threat by summons[35], to one of inclusion by the promotion of agency and being invited to participate freely. Whatever the solution, it is important to recognize that the jury institution is meant to legitimize the criminal process in the eyes of the public. If certain of its cornerstone principles are interpreted with such rigidity as to shake public confidence, then new methods are required.

Conclusion

The COVID-19 pandemic postponed the conclusion of either of the roundtable series discussed in this article. However, detailed discussions and recommendations from the roundtable can be found on CIAJ's website.[36] Once either series concludes, a report setting out a summary of best practice and recommendations will be published. ■

NOTES

1. The Canadian Institute for the Administration of Justice brings together individuals and institutions involved in the administration of justice and promotes excellence through knowledge, learning and the exchange of ideas: **ciaj-icaj.ca**

2. Four roundtables on jury representation took place during the spring and fall of 2019 in the following provinces: Manitoba (Winnipeg) on April 6th, British Columbia (Vancouver) on June 1st, Nova Scotia (Halifax) on September 21st representing Atlantic Canada, and Alberta (Calgary) on November 2nd; 3 roundtables on criminals delays were held between 2017 and 2018 in the following provinces: in British Columbia (Vancouver) on December 2nd 2017, in Alberta (Edmonton) on October 13 2018 and finally in Nova Scotia on December 1st 2018: **ciaj-icaj.ca/en/activities/national-discussions**

3. Participants comprised of lawyers, judges, deputy ministers and scholars, stakeholders, community leaders and Indigenous Elders.

4. *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

5. *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

6. *R v Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398.

7. *Supra* note 4 at para. 4, 29 and 40.

8. *Ibid* at paras 46–48: "The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry)".

9. *R v Cody*, 2017 SCC 31, [2017] 1 SCR 659.

10. *Supra* note 6 at para 2

11. *Ibid* per Karakatsanis J. at para. 138 and Cromwell J. in dissent at para. 198 and 305. Note that the rolls in question concerned Indigenous people residing on reserves.

12. *Supra* note 4 at para. 26, see also para. 20, 22, 25, 40 and 44 and *R v Askov*, 1990 CanLII 45 [1990] 2 SCR 1199, at 1221.

13. *Supra* note 6 at para. 25 and 26.

14. *Ibid* at para. 126 and 127.

15. *Ibid* at para. 292 and 293.

16. Manitoba, Aboriginal Justice Inquiry, *The Justice System and Aboriginal People: Chapter 9 Juries*, vol 1 (*Manitoba Report*); Ontario, Ministry of the Attorney General, *First Nations Representation on Ontario Juries: Report on the Independent Review Conducted by the Honourable Frank Iacobucci*, (2013) (*Iacobucci Report*); See also Canada, House of Commons Standing Committee on Justice and Human Rights *Improving Support for Jurors in Canada*, (2018).

17. *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (S.C. 2019, c. 25).

18. *Supra* note 4 at para.: 40 and 41.

19. *Ibid*. at para. 40: By "actors" we can look to the court's summary of: police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament.

20. See *Jordan* at para. 60. Note that the *Jordan* framework does away with the previous *Morin* analysis that sought to tabulate delays caused by institutions (called institutional delay). The current framework hinges on a two-step calculation: (1) The first step under this framework entails "calculating the total delay from the charge to the actual or anticipated end of trial" and (2): After the total delay is calculated, "delay attributable to the defence must be subtracted" (*Jordan*, at para. 60). The result, or net delay, must then be compared to the applicable presumptive ceiling (see *supra* note 9 at para. 21 and 22).

21. See the Court's strategic plan **www.albertacourts.ca/docs/default-source/pc/strategic-plan-2018-2021-finalb674eb391b316d6b9fc9ff00001037d2.pdf?sfvrsn=54458680_6**

22. Most recently being Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms *98 (2) Canadian Bar Review, (2020)"*. See also Richard Jochelson et al, "Revisiting Representativeness in the Manitoba Jury" (2015) 37 Man LJ 365; Mark Israel, "The underrepresentation of Aboriginal People on Canadian Jury Panels" (2003) 25 *U Denver L and Policy* 37. CIAJ has also done some work, most comprehensively in its report prepared for the roundtables: Nathan Afilalo. "Jury Representation in Canada: Systemic Barriers and Biases in the 'Conscience of the Community': Report of the Canadian Institute for the Administration of Justice," (2018) Canadian Institute for the administration of Justice, Montreal.

23. *Supra* note 6 at para. 27.

24. *Ibid* at para. 40 and 51.

25. *Ibid* at para. 50 and 53.

26. *Ibid* at para. 50.

27. See *R v Born with a* Tooth, 1993 7066 (AB QB).

28. *Supra* note 6 at para. 64.

29. *Supra* note 27 at para. 12; *Supra* note 6 at para. 41, 42 and 51. The majority also considered the practical issues with such a model: Requiring that a jury roll proportionately represent the different religions, races, cultures, or individual characteristics of eligible jurors would create a number of insurmountable problems. As the Ontario Court of Appeal held in *R. v. Brown* (2006), 2006 CanLII 42683 (ON CA), 215 C.C.C. (3d) 330, at para. 22:

> There are an almost infinite number of characteristics that one might consider should be represented in the petit jury: age, occupation, wealth, residency, country of origin, colour, sex, sexual orientation, marital status, ability, disability and so on. It would be impossible to ensure this degree of representation in any particular jury.

See *supra* note 6 at 127: The majority further did not think that case was an appropriate forum to discuss the province's efforts for reconciliation and thus it would be inappropriate for the Ontario jury selection process to provide for enumerated grounds for greater inclusion of Indigenous communities.

30. Kent Roach, *Miscarriages of Justice and the Bill C-75 Reforms*, (2020) 98 (2) Canadian Bar Review, at 17 and 22.

31. *R v Gladue*, 1999 679 (SCC), [1999] 1 SCR 688, in which the SCC introduced principles for judges to include when sentencing Indigenous offenders.

32. See *supra* note 16.

33. O. Reg. 266/14: On-Reserve Representation, Juries at Coroners' Inquests, Territorial Districts of Kenora and Thunder Bay, under the *Coroners Act, R.S.O. 1990, c. C.37*. See *supra* note 16 at recommendation 12 (*Iacobucci Report*).

34. *Supra* note 16 (*Manitoba Report*); See also s.8 of *Jury Act*. R.S.NW.T. 1988, c.J-2, for provision prioritizing jurors who live within 30 km from the place of trial.

35. *Supra* note 16 at the 10th recommendation and para. 237 and 273 *(Iacobucci Report*).

36. ciaj-icaj.ca/en/activities/national-discussions

Tables rondes sur la représentativité des jurys et les délais dans le système de justice pénale

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NATHAN AFILALO
Avocat

De décembre 2017 à novembre 2019, l'Institut canadien d'administration de la justice (ICAJ)[1] a tenu deux séries de tables rondes, l'une sur la sous-représentation des Autochtones et des minorités au sein des jurys et l'autre sur les délais dans le système de justice pénale.[2]

Ces tables rondes ont permis aux membres de la communauté juridique de la province hôte d'échanger des stratégies de résolution de problèmes. Chacun a pu mieux comprendre comment les enjeux se posent ailleurs et faire le point sur les critiques formulées à l'égard de certains projets en cours et à venir.[3] Des solutions comme des problèmes récurrents communs aux deux séries ont fait surface. Cet article présente les principaux enjeux abordés lors les deux séries.

L'Institut canadien d'administration de la justice rassemble les individus et les institutions au service de l'administration de la justice et vise à promouvoir l'excellence en favorisant l'acquisition de connaissances, la formation et l'échange d'idées : ciaj-icaj.ca

Les tables rondes sur les délais ont mis en relief l'approche administrative utilisée par les tribunaux afin de respecter les délais fixés par l'arrêt *Jordan* (2016)[4], plutôt qu'une approche comportementale et éducative centrée sur l'intervenant. Les tables rondes sur la représentativité des jurys ont mis l'accent sur la nécessité pour les provinces d'aller plus loin que la norme établie dans l'arrêt *Kokopenace*[5] pour le processus de sélection des jurys, en ce qui concerne les alinéas 11 *d)* et 11 *f)* de la *Charte canadienne des droits et libertés*[6] (la *Charte*), ainsi que d'imposer davantage d'obligations positives pour accroître la présence des groupes sous-représentés.

La loi

Afin de réduire les retards considérables en matière de justice pénale et de remédier à la « complaisance » des différents acteurs du système de justice[7], la Cour suprême (CSC) a établi dans l'arrêt *Jordan* un nouveau cadre d'analyse permettant de déterminer s'il y a eu violation du droit de « voir sa sentence prononcée dans un délai raisonnable », en vertu de l'alinéa 11 *b)* de la *Charte*. La CSC a fixé des plafonds présumés au-delà desquels on peut conclure qu'il y a violation, sauf « circonstances exceptionnelles »[8] démontrées par le ministère public. Dans une affaire ultérieure, la CSC a réaffirmé que, dans le cadre de l'arrêt *Jordan*, chaque acteur du système judiciaire est tenu de prévenir ces violations de manière proactive.[9]

Dans l'arrêt *Kokopenace*, la CSC a défini le critère permettant de déterminer s'il y a eu violation du droit à un jury représentatif, protégé par les alinéas 11 *d)* et 11 *f)* de la *Charte*. Il n'y a pas de violation si la province déploie des « efforts raisonnables » pour (1) dresser la liste des jurés en sélectionnant ceux-ci au hasard à partir de listes brutes issues d'un large échantillon de la société et (2) envoyer des avis de sélection de juré aux personnes choisies au hasard.[10] Dans *Kokopenace*, le système de sélection provincial avait produit des listes ne comprenant que 4,1 % de jurés potentiels d'origine autochtone venant du district de Kenora, alors que sa population était composée de 30 % de résidents autochtones.[11] Les juges majoritaires de la CSC ont estimé que les efforts déployés par la province étaient raisonnables, même si les listes brutes comportaient des failles.

Enjeu : la confiance du public

Bien que chaque série comporte des enjeux spécifiques, les participants ont fait face à un enjeu commun, soit la confiance du public dans le système de justice. Dans l'arrêt *Jordan*, les juges majoritaires ont souligné à répétition la question de l'impact du « prolongement des délais » sur la confiance du public dans le système de justice, dont la survie dépend justement de cette confiance.[12] Le droit d'être jugé « dans un délai raisonnable » prévu par la *Charte* à l'alinéa 11 *b)* protège contre les longues périodes de détention avant le procès et l'absence de finalité pour les victimes, leurs familles et celles de l'accusé. Lorsque les longs procès deviennent la norme, il en va de même de la frustration du public à l'égard du système et de la perte de confiance en celui-ci.[13]

Dans l'arrêt *Kokopenace*, la CSC a confirmé la sous-représentation des peuples autochtones au sein des jurys ainsi que les effets préjudiciables du système de justice pénale sur cette population, mais n'a pas estimé que ces effets avaient des conséquences juridiques au sens des alinéas 11 *d)* et *f)* de la *Charte*.[14] La possibilité que cette sous-représentation puisse miner la confiance du public dans le système judiciaire a néanmoins été soulevée par le juge Cromwell dans une opinion dissidente[15] et plusieurs rapports officiels soulignent son impact sur la marginalisation des peuples autochtones.[16] Le problème persiste, comme en témoigne la controverse au sujet du jury entièrement blanc dans l'affaire *R c Stanley* et la suppression des récusations péremptoires qui s'ensuivit.[17]

Stratégies administratives visant à réduire les délais

Les participants aux tables rondes sur les délais ont examiné diverses stratégies pouvant contribuer à faire respecter les plafonds présumés fixés par la CSC. Puisque cette dernière a relevé une « culture de complaisance »[18] au sein du système de justice[19], un large éventail de stratégies a été déployé pour faire respecter ces plafonds. Diverses approches ont été envisagées, parmi lesquelles l'approche administrative et l'approche comportementale (cette dernière visant à aider les institutions et les intervenants à être proactifs plutôt que complaisants) ainsi que l'approche éducative, visant à mieux préparer les étudiants en droit et les jeunes avocats.

La plupart des discussions ont porté sur les stratégies administratives, lesquelles font appel à la gestion des ressources de l'État et des tribunaux afin d'accroître la capacité des institutions judiciaires à traiter une affaire efficacement.[20] Ces stratégies peuvent être mises en œuvre avant l'inculpation, soit avant que les retards ne soient pris en compte, mais elles peuvent aussi être mises en œuvre pendant la période qui précède le procès et même durant celui-ci, ce qui peut avoir un effet sur le traitement de l'affaire.

D'après les discussions, les stratégies administratives semblent comprendre les efforts des tribunaux et d'instances comme les services de police et les procureurs de la Couronne, pour : 1) simplifier et harmoniser le traitement des dossiers entre les différentes instances, 2) réorienter et redistribuer les ressources afin de prioriser la réduction des délais, et 3) promouvoir des mesures permettant le triage et l'identification précoce des dossiers qui pourraient entraîner de longs retards.

À l'époque de la table ronde, la Cour provinciale de l'Alberta a offert l'exemple d'une approche globale intégrant les trois stratégies. Celle-ci a demandé à des juges à la retraite et surnuméraires de tenir des conférences préparatoires au procès dans les procès sans jury, tout en programmant trois affaires civiles simultanément dans la même salle afin de libérer de l'espace pour les procès criminels. La Cour a resserré le triage, évalué les affaires en amont, classé les infractions graves par ordre de priorité et distribué les ressources en fonction de la complexité des affaires et de la

gravité des infractions, tout en embauchant des gestionnaires de dossiers et en créant des comités de gestion. En parallèle, des formulaires normalisés ont été adoptés pour effectuer les suivis, ainsi que des méthodes normalisées permettant aux procureurs d'examiner les dossiers et d'appliquer une approche axée sur des principes. Un système provincial a été mis sur pied pour coordonner les procès et orchestrer une utilisation optimale des ressources judiciaires.

Les tables rondes ont permis de partager nombre de projets qui répondaient aux besoins spécifiques d'une province, d'une juridiction et même d'un palais de justice en particulier. Les projets étaient différents, mais tous étaient soutenus par un plan stratégique priorisant l'efficacité et la volonté de réduire les délais par une approche globale et flexible. Cela impliquait de fixer des délais à atteindre et d'établir des mécanismes permettant de mesurer l'efficacité des stratégies mises en œuvre par le tribunal pour les respecter.[21]

Le fait que ces mesures prennent source dans les institutions qui traitent les dossiers signifie qu'elles sont par définition centralisées, et ceci pourrait expliquer leur importance dans les discussions. Même si, dans l'arrêt *Jordan*, les juges majoritaires ont condamné l'attitude léthargique tant des juges que des avocats, il semble difficile d'obtenir un changement d'attitude sans changer le système lui-même. En transformant le milieu de travail, les stratégies administratives pourraient renforcer l'effet des changements déontologiques visant à encourager les juristes à adopter un comportement proactif.

Fardeau de l'État et volontariat

Alors que les participants à la première série de tables rondes sur les délais ont voulu travailler à l'intérieur du cadre de l'arrêt *Jordan*, les participants à la série sur la représentativité des jurys ont été beaucoup plus critiques à l'égard du droit applicable.

Les participants ont discuté du cadre d'analyse de l'arrêt *Kokopenace* et de la possibilité de le modifier, afin d'augmenter le fardeau et les obligations des provinces requis pour déterminer si l'État s'est acquitté de son obligation de représentativité relevant à la fois des alinéas 11 *d)* et 11 *f)* de la *Charte*.[22] Dans l'affaire *Kokopenace*, par exemple, il a été jugé que la province avait déployé des « efforts raisonnables » alors que ses listes de jurés excluaient 3 des 46 réserves admissibles, et malgré le nombre disproportionnellement faible de jurés autochtones potentiels.[23] Les juges majoritaires ont expliqué que pour satisfaire aux droits énoncés aux alinéas 11 *d)* et 11 *f)*, il faut investiguer le processus de sélection aléatoire servant à constituer le jury, et non sa composition finale.[24] Il peut y avoir atteinte à la présomption d'impartialité du processus de sélection[25] quand 1) il y a exclusion délibérée d'un groupe en particulier et 2) les efforts déployés par l'État pour dresser la liste des jurés peuvent laisser à désirer au point de créer une apparence de partialité.[26]

Les participants ont réitéré que le remède à un fardeau de l'État trop faible consiste à ajouter une obligation pour les provinces d'adopter des mesures substantielles et positives visant à inclure les groupes qui sont systématiquement sous-représentés. L'idée de passer de l'analyse procédurale actuelle à une analyse substantielle est un vieux débat.[27] La CSC a longtemps rejeté l'approche substantielle pour différents motifs, le principal étant qu'une approche substantielle découle essentiellement du modèle de sélection aléatoire sur lequel repose le processus de sélection canadien[28], et dans lequel la sélection aléatoire est garante d'impartialité et donc inspire confiance au public.[29]

Si les participants s'accordent à dire que l'approche substantielle présente des difficultés, les motifs énumérés ou analogues liés aux groupes défavorisés énoncés dans la *Charte* ne sont pas étrangers à leur analyse.[30] Il suffit de penser aux principes de Gladue pour la détermination de la peine.[31] Il existe une abondante documentation sur la question de la représentativité des jurys dans le contexte plus large de la marginalisation des peuples autochtones.[32] Ces écrits provenant de commissions et de spécialistes pourraient nous éclairer sur les circonstances qui exigent des efforts positifs de la part de l'État en matière de représentativité.

Les participants ont noté que les obligations positives des provinces n'ont pas à être poussées au point de fournir à l'accusé son jury idéal. Il s'agirait plutôt d'adopter des mesures permettant de créer un climat de confiance et d'établir de bonnes relations, comme des programmes éducatifs ou la création de modèles volontaires tels que les

« volontaires de réserve » pour les enquêtes du coroner à Kenora et Thunder Bay.[33]

Un système davantage axé sur le volontariat pourrait aussi sélectionner des jurés qui résident là où se tient l'audience afin de permettre à la communauté de se sentir impliquée.[34] Le volontariat peut changer l'expérience des communautés sous-représentées en matière de sélection des jurés, en transformant une expérience de marginalisation (par négligence ou en raison de l'aspect contraignant des avis de convocation)[35], en une expérience d'inclusion (en encourageant la capacité d'agir et la libre participation).

Quelle que soit la solution, il est important de reconnaître que la constitution d'un jury est appelée à légitimer le processus pénal aux yeux du public. Si certains de ses principes fondamentaux sont interprétés avec une rigidité telle que le public perd confiance, il faut changer de méthode.

Conclusion

La pandémie de COVID-19 a reporté la conclusion de certaines tables rondes. Toutefois, les discussions et les recommandations issues des tables rondes sont disponibles sous forme de comptes rendus sur le site web de l'ICAJ.[36] À la fin de chaque série, un rapport final sera publié afin de résumer les meilleures pratiques et recommandations. ■

NOTES

1. L'Institut canadien d'administration de la justice rassemble les individus et les institutions au service de l'administration de la justice et vise à promouvoir l'excellence en favorisant l'acquisition de connaissances, la formation et l'échange d'idée : **ciaj-icaj.ca/fr**

2. Il y a eu quatre tables rondes sur la représentativité des jurys au printemps et à l'automne 2019 : le 6 avril au Manitoba (Winnipeg), le 1er juin en Colombie-Britannique (Vancouver), le 21 septembre en Nouvelle-Écosse (Halifax) et le 2 novembre en Alberta (Calgary) ; il y a eu trois table rondes sur les délais dans le système de justice pénale en 2017 et 2018 : le 2 décembre 2017 en Colombie-Britannique (Vancouver), le 13 octobre 2018 en Alberta (Edmonton), et le 1er décembre 2018 en Nouvelle-Écosse (Halifax) : **ciaj-icaj.ca/fr/bibliotheque/textes-et-articles/tables-rondes**

3. Parmi les participants se trouvaient des avocats, juges, vice-ministres, universitaires, parties prenantes, dirigeants communautaires et Aînés autochtones.

4. *R c Jordan*, 2016 CSC 27, [2016] 1 RCS 631 (*Jordan*).

5. *R c Kokopenace*, 2015 CSC 28, [2015] 2 RCS 398 (*Kokopenace*).

6. *Loi constitutionnelle de 1982*, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.

7. *Supra* note 4 aux par. 4, 29, 40.

8. *Ibid*. aux para 46–48 : "Ce « plafond présumé » est fixé à 18 mois pour les affaires instruites devant une cour provinciale et à 30 mois pour celles instruites devant une cour supérieure (ou celles instruites devant une cour provinciale à l'issue d'une enquête préliminaire)."

9. *R v Cody*, 2017 SCC 31, [2017] 1 SCR 659.

10. *Supra* note 6 au par. 2.

11. *Ibid*. au par. 138, juge Karakatsani ; *Ibid*. aux par. 198 and 305, juge Cromwell, dissident. Notez que les listes en question concernaient les autochtones qui demeuraient en réserves.

12. *Supra* note 4 au par. 26, voir aussi aux par. 20, 22, 25, 40 et. 44 ; voir R c Askov, 1990 CSC 45 CSC, [1990] 2 RCS 1199 à la p1221.

13. *Supra* note 6 aux par. 25, 26.

14. *Ibid*. aux par. 126, 127.

15. *Ibid*. aux par. 292, 293.

16. Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Report of the Aboriginal Justice Inquiry of Manitoba, vol. 1, *The Justice System and Aboriginal People : Chapter 9 : Juries*, (Winnipeg), 1991 (Rapport du Manitoba). Ontario, Ministère du Procureur général de l'Ontario, *La représentation des Premières Nations sur la liste des jurés en Ontario : Rapport de l'examen indépendant mené par l'honorable Frank Iacobucci*, par Frank Iacobucci, (Toronto), 2013 (Rapport Iacobucci). Voir aussi « House of Commons Standing Committee on Justice and Human Rights *Improving Support for Jurors in Canada* (2018) ».

17. *Loi modifiant le Code criminel, la Loi sur le système de justice pénale pour les adolescents et d'autres lois et apportant des modifications corrélatives à certaines lois*, LC 2019, c 25.

18. *Supra* note 4 aux par. 40, 41.

19. *Ibid*. au par. 40. By "actors" *we can look to the court's summary of : police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament*.

20. *Supra* note 4 au par. 60. Il est à noter que l'arrêt *Jordan* supprime l'analyse *Morin* précédente qui cherchait à comptabiliser les délais causés par les institutions. Le cadre d'analyse actuel repose sur un calcul en deux étapes : « le calcul du délai total entre le dépôt des accusations et la conclusion réelle ou anticipée du procès. Une fois ce délai établi, il faut en soustraire le délai imputable à la défense. »

21. Consulter le plan stratégique de la cour d'Alberta : plan **www.albertacourts.ca/docs/default-source/pc/strategic-plan-2018-2021-finalb674eb391b316d6b9fc9ff00001037d2.pdf?sfvrsn=54458680_6**

22. Le plus recent étant être de Kent Roach, « Juries, Miscarriages of Justice and the Bill C-75 Reforms *98 (2) Canadian Bar Review, (2020).* » ; Voir aussi Richard Jochelson et al, « Revisiting Representativeness in the Manitoba Jury » (2015) 37 Man LJ 365 ; Voir aussi Mark Israel, « The underrepresentation of Aboriginal People on Canadian Jury Panels » (2003) 25 *U Denver L and Policy 37*. L'ICAJ a également effectué un revue plus complète dans son rapport préparé pour les tables rondes « Jury Representation in Canada : Systemic Barriers and Biases in the 'Conscience of the Community' : Report of the Canadian Institute for the Administration of Justice » (2046-4818)

23. *Supra* note 6 au par. 27.

24. *Ibid*. aux par. 40, 51.

25. *Ibid*. aux par. 50, 53.

26. *Ibid*. au par. 50.

27. Voir *R c Born with a Tooth*, 1993 7066 (AB QB).

28. *Supra* note 6 au par. 64.

29. *Supra* note 27 au par. 12 ; *Supra* note 6 aux par. 41, 42 and 51. Les juges majoritaires se sont également penchés sur les questions pratiques liées à un tel modèle au par. 42, disant que : « Exiger qu'une liste de jurés représente proportionnellement les différentes religions, races, cultures ou autres caractéristiques personnelles des personnes habiles à être jurés engendrerait plusieurs problèmes insolubles. Comme l'a affirmé la Cour d'appel de l'Ontario au par. 22 de l'arrêt *R. c. Brown* (2006), 2006 CanLII 42683 (ON CA), 215 C.C.C. (3d) 330 :

> [traduction] Il existe un nombre presque infini de caractéristiques qu'on pourrait considérer comme devant être représentées dans le petit jury : l'âge, la profession, la fortune, la résidence, le pays d'origine, la couleur, le sexe, l'orientation sexuelle, l'état matrimonial, la capacité, l'incapacité, etc. Il serait impossible d'assurer un tel degré de représentativité dans un jury donné. »

Voir supra note 6 au par. 127 : De plus, les juges majoritaires ne considéraient pas l'arrêt comme un forum approprié pour discuter des efforts de réconciliation de la province et donc n'ont pas fait d'analyse approfondie visant les obligations positives.

30. Kent Roach, "Miscarriages of Justice and the Bill C-75 Reforms," 98 (2) Canadian Bar Review, (2020) aux p.17, 22.

31. *R c Gladue*, 1999 CanLII 679 (CSC), [1999] 1 RCS 688, l'arrêt qui a introduit les principes requis pour la détermination de la peine d'une personne autochtone.

32. *Supra* note 16.

33. Représentation des résidents des réserves, jurys aux enquêtes des coroners, districts territoriaux de Kenora et de Thunder Bay, Règl. de l'Ont 266/14 ; Voir aussi *supra* note 16 à la 12e recommandation du *Rapport Iacobucci*.

34. *Supra* note 16 au *Rapport du Manitoba*. Consulter aussi l'art. 8 du *Jury Act*. R.S.NW.T. 1988, c.J-2, qui priorise les jurés qui résident dans un rayon de 30 km de la cour ou le procès se déroule.

35. *Supra* note 16 à la 10e recommandation du *Rapport Iacobucci* et la discussion aux par. 237, 273.

36. ciaj-icaj.ca/fr/activites/discussions-nationales

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Lieu : Halifax

YOUNG RESEARCHER SECTION - The CCJA congratulates CHANEL BLAIS as the recipient of a Mount Royal University scholarship, the benefits of which include CCJA membership and publication of the following shortened, article-style version of her winning Honour's paper - "A Critical Assessment of Mr. Big Operations and *R. v. Hart*" - in this issue of the *Justice Report*!

A Critical Assessment of Mr. Big Operations and the Application of *R. v. Hart*

CHANEL BLAIS
Bachelor of Arts – Criminal Justice (Honours)

The Canadian Mr. Big interrogation is an undercover policing, confession-producing technique (R. v. Hart; Smith, Stinson, & Patry, 2010, p. 39; Holmgren, 2017, p. 148) developed in the 1990s by the RCMP for use in cold cases where conventional investigations have failed to solve serious crimes. While the risk of false confession with Mr. Big is called into question by wrongful conviction advocates, civil rights groups, academics and defense attorneys, it is commended by the Royal Canadian Mounted Police (RCMP). The Supreme Court, in R. v. Hart (2014), added a two-pronged common law rule when trying Mr. Big cases to protect against wrongful convictions and abuse of power. However, analyses of subsequent rulings point to inconsistencies in the application of the Hart framework across the courts and the need for added legal protections for subjects of Mr. Big operations.

Are more legal protections for subjects of Mr. Big stings necessary to overcome the associated risks of false confession and miscarriage of justice? Such concerns were identified and addressed by the Supreme Court ruling for *R. v. Hart*, which resulted in regulations that have led to the inadmissibility of several confessions and one exoneration in subsequent Mr. Big cases. Further rulings, however, make it clear that *R. v. Hart* did not adequately address all grievances associated with the RCMP-developed Mr. Big technique (see, for example, Iftene and Kinnear, 2020).

To increase police accountability, the use of violent inducements in Mr. Big operations has decreased but financial inducements prevail; both methods risk extracting false confessions from targeted suspects. The impact of *R. v. Hart* has been less than optimal and many, including the Supreme Court of Canada, consider that Canadians need more applicable legal protections concerning Mr. Big stings, including a uniform application by the courts of the *R. v. Hart* common law rule (Iftene and Kinnear, 2020). The possibility of undetected wrongful convictions and the potential for future miscarriages of justice resulting from false confessions elicited from Mr. Big operations warrants a thorough review of previous Mr. Big cases.

WHO OR WHAT IS MR. BIG?

The Canadian Mr. Big approach to cold cases was largely created in the 1990s by the RCMP (Keenan & Brockman, 2010, p. 17-18), which continues to commend it (*R. v. MM*, 2015, p. 2; Puddister & Riddell, 2012, p. 386-387). In a Mr. Big investigation, undercover officers observe a suspect until familiar with their routines (Connors, Archibald, Smith, & Patry, 2017, p. 27); they explore the personality

of the suspect by conferring with psychologists (Keenan & Brockman, 2010, p. 19); an undercover officer then befriends the suspect (Smith, Stinson, & Patry, 2010, p. 39); this initial encounter takes place at a location the suspect frequents (*R. v. MM*, 2012, p. 26; Connors et al., 2017, p. 27); the operative develops a close friendship with the suspect (Smith et al., 2010, p. 39), treats the suspect to nights out to clubs and casinos, exposing the suspect to a staged glamourous lifestyle (Murphy & Anderson, 2016, p. 31; Smith et al., 2010, p. 39).

The officer introduces the suspect to multiple officers posing as members of a criminal organization (Holmgren, 2017, p. 148; Smith et al., 2009, p. 169-170) that hires the suspect to complete simple jobs for which the suspect is compensated up to several thousand dollars per week (Smith et al., 2010, p. 39; Keenan & Brockman, 2010, p. 20). The suspect is exposed to pseudo-crimes such as drug trafficking, kidnapping, and murder to depict an authentic sense of corruption (Holmgren, 2017, p. 148; Puddister & Riddell, 2012, p. 386; Keenan & Brockman, 2010, p. 20). Themes of loyalty and honesty are presented as valuable assets to the syndicate (Keenan & Brockman, 2010, p. 13). Gruesome simulated acts of violence can be performed (*R. v. Hart*, 2014, p. 571). The goal is to educate the suspect that betrayal of trust is unacceptable, yet criminal activity is tolerated (*R. v. Magoon*, 2015, p. 8).

Mr. Big, the head of the organization, is portrayed as a menacing, omnipotent person (Keenan & Brockman, 2010, p. 20). To become a member, the suspect must be job-interviewed by Mr. Big (Puddister & Riddell, 2012, p. 386; Schleichkorn, 2013, p. 389; *R. v. Hart*, 2014, p. 545). To secure their position, the suspect must provide a confession to the crime in question (Schleichkorn, 2013, p. 390; Smith et al., 2010, p. 40). The meeting is covertly videotaped by police (Smith et al., 2010, p. 40). Mr. Big informs the suspect that he has access to compelling evidence against him or her that is attracting too much attention to the organization and that refusing to confess demonstrates dishonesty (*R. v. Hart*, 2014, p. 571-572; Smith et al., 2010, p. 39-40). Denials of guilt are dismissed as lies (*R. v. Hart*, 2014, p. 572). To encourage the suspect to confess, Mr. Big may say he can take the attention off the organization by having someone, who owes him a favor, confess to the suspect's crimes (Connors et al., 2017, p. 27; Smith et al., 2010, p. 40). If the suspect does not confess, he will lose his high-paying, lavish lifestyle with Mr. Big (Smith et al., 2010, p. 40).

Mr. Big operations occur when there is little to no forensic evidence; yet, the confession acquired through the operation is often the only—and deemed sufficient—evidence presented to convict (Puddister & Riddell, 2012, p. 385-386; Schleichkorn, 2013, p. 392; Keenan & Brockman, 2010, p. 15). Operations are launched on both youth (*R. v. NRR*, 2014, 3) and adult suspects. These investigations last months (Holmgren, 2017, p. 149) and can employ up to 50 officers (Smith et al., 2010, p. 40). Hundreds of cases have been closed using this technique (*R. v. Hart*, p. 570). Individual Mr. Big operations costs taxpayers thousands to millions (Keenan & Brockman, 2010, p. 23-24).

Mr. Big operations are prohibited in the United States, England, and Germany (Puddister & Riddell, 2012, p. 386-387). In European courts, undercover deception is considered an invasion of privacy (Moore et al., 2009, p. 349). Section 25 of the Canadian Criminal Code provides legal protection for law enforcement to engage in deceptive behavior to solve a serious crime. This section condones police lies, tricks, and undercover work when police are dealing with sophisticated criminals (Parent & Parent, 2018, p. 79). A widespread misconception of Mr. Big operations is that they are a form of entrapment (Puddister & Riddell, 2012, p. 397). Since the crimes that the suspect is required to commit for the criminal organization are fake, and the suspect is not later charged with these offences, the operation is legal (Puddister & Riddell, 2012, p. 397).

ADVANTAGES AND SUCCESSES OF MR. BIG OPERATIONS

The Mr. Big technique effectively produces confessions 75 percent of the time (Holmgren, 2017, p. 155). It is a sophisticated manner of eliciting confessions and an effective way of addressing murder cases gone cold (Holmgren, 2017, p. 155). These operations have successfully led investigators to missing evidence, such as the murder weapon or the body of the deceased (*R. v. Hart*, 2014, p. 572; Holmgren, 2017, p. 155). Timothy Moore (2019), an expert on Mr. Big operations, describes the tactic as "ingenious" (p. 2). The

confession acquired from the Mr. Big operation in the tragic *R. v. Magoon* child torture, murder case was vital for the prosecution to convict the two accused (*R. v. Magoon*, 2018, p. 320). And, had it not been for the launch of a Mr. Big operation on Michael Bridges, the body of teenage Erin Chorney would not have been found and she would still be considered a missing person (Keenan & Brockman, 2010, p. 15).

THE HART RULES: DESIGNED TO PREVENT POTENTIAL INJUSTICES OF MR. BIG OPERATIONS

Nelson Hart, suspected of having drowned his daughters, was subjected to a Mr. Big operation (*R. v. Hart*, 2014, p. 545 & 562). Hart, intermittently homeless, was paid several thousand dollars by officers posing as members of a criminal organization (Moore, 2019, p. 7; *R. v. Hart*, 2014, p. 545 & 563-564; Murphy & Anderson, 2016, p. 30). Hart confessed and was convicted of two counts of first-degree murder (*R. v. Hart*, 2014, p. 545 & 564 -565).

NEW COMMON LAW RULE OF EVIDENCE

Hart's case was appealed to the Supreme Court of Canada (*R. v. Hart,* 2014, p. 569-570; Moore, 2019, p. 9), whose ruling raised three primary concerns of Mr. Big operations:

(1) The risk of false confessions (*R. v. Hart*, 2014, p. 574-575).

(2) The prejudicial effects of Mr. Big operations (*R. v. Hart*, 2014, p. 576).

(3) Police misconduct (*R. v. Hart*, 2014, p. 578).

To address these, the Supreme Court of Canada created a two-pronged, common law rule of evidence to determine the admissibility of confessions elicited through Mr. Big investigations (Murphy & Anderson, 2016, p. 30).

The first prong renders any Mr. Big confession inadmissible unless the Crown can prove that its prejudicial effects outweigh its probative value (*R. v. Hart*, 2014, p. 580). Prejudicial effects are evidence that portray the accused as an immoral individual yet must be included to put the confession into context (*R. v. Ledesma*, 2017, p. 6)—such as the suspect's willingness to join a criminal organization and take part in pseudo-crimes (*R. v. Hart*, 2014, p. 576). The probative value of a confession may increase if, for instance, the confession produces hold-back evidence—aspects of the crime otherwise unknown to the public.

The second prong places the onus on the accused to demonstrate that an abuse of process has occurred (*R. v. Hart,* 2014, p. 580-589). Coerced confessions, threats of violence, monetary awards, as well as investigations that prey on one's substance addiction, mental health, level of intellect, or young age constitute abuse of process (*R. v. Hart*, 2014, p. 581 & 590 & 628; Connors et al., 2017).

In *R. v. Hart*, the high Court found that the sting had "lifted the respondent out of poverty", which brought about "a corresponding change in the respondent's lifestyle" and thus, a newfound sense of social inclusion (*R v. Hart*, 134). This, coupled with the inconsistency of his confessions failed the test of reliability and his confessions were deemed inadmissible (*R. v. Hart*, 2014, p. 598). The test for abuse of process was not required because the first test failed; yet the Supreme Court acknowledged that preying on Hart's mental health, poverty, and social isolation constituted an abuse of process and was an infringement of Hart's (s.7) right to life, liberty, and security of the person (*R. v. Hart*, 2014, p. 600-601& 631).

With Mr. Big, the suspect is given an ultimatum: either confess and receive a consequence-free ticket into a profitable organization, or don't confess and lose every benefit the operatives have laid out (*R. v. Kelly*, 2017, para. 12; *R. v. MM*, 2015, p. 24). Coercion occurs when a suspect is deprived of a reasonable alternative to confessing (*R. v. Hart*, 2014, p. 615). Mr. Big operations are in and of themselves coercive (*R. v. Hart*, 2014, p. 623) because the respondent does not know he or she is confessing to a law enforcement officer (*R v. Hart*, 64) and has been told the confession will guarantee them a better life. Also, the Charter does not extend the right to silence nor the right to counsel to Mr. Big's subjects because they are not formally detained by the police at the time of their confession (*R. v. Herbert*, 1990). In addition, the "confession rule"—which requires the Crown to prove that an accused's statement(s) to police was 'voluntary'—is unapplicable, because the accused does not know that Mr. Big is a police officer when he or she confesses" (Dufraimont, 2011, p. 311; *R. v. Hart*, 2014 SCC 52).

DOES R. V. HART PROVIDE EFFECTIVE LEGAL PROTECTIONS?

1. PROBATIVE VALUE OF THE CONFESSION

Maturity and level of vulnerability—In *R. v. Yakimchuk*, *R. v. Ledesma*, *R. v. West*, and *R. v. MM*'s cases, their "street-smarts," sophistication-level, and outgoing personalities were characterized as signs of maturity which, when applying the *R. v. Hart* rules, served to increase the reliability of their confessions and decrease any abuse of process (*R. v. Ledesma*, 2020, p. 18; *R. v. MM*, 2015, p. 22; *R. v. Yakimchuk*, 2017, p. 13; *R. v. West*, 2015, p. 27). As a benchmark, Hart's case cannot consistently be the tool of comparison because his vulnerabilities were so significant as to make it easy for another defendant's vulnerabilities to be overlooked (*R. v. MM*, 2015, p. 22-23).

Accuracy of hold-back evidence—Although the accuracy and thus the reliability of the confession in *R. v. MM* (2015) was rather high as regards the hold-back evidence, the court failed to acknowledge that the hold-back evidence would have been known to both the shooter and the accused having accompanied the shooter (p. 14-15). The *R. v. MM* (2015) youth case is an example of how the false confessions elicited from Mr. Big operations risk not only wrongfully convicting, but wrongly convicting an individual. There was stronger motive-driven evidence that the individual who accompanied MM—who had previously been stabbed in the chest by the murder victim—had pulled the trigger (*R. v. MM*, 2012, p.14; *R. v. MM*, 2015, p. 27-28). An RCMP officer testified that he had received information from two sources that the individual who accompanied MM—who had since fled to Venezuela—had fired the gun (*R. v. MM*, 2012, p. 40). Additionally, the girlfriend of MM's accomplice informed police in a detailed interview that her boyfriend informed her that he, not MM, had fired the gun (*R. v. MM*, 2015, p. 14). MM made several statements to undercover operators about disposing of evidence (*R. v. MM*, 2015, p. 23).

The details of this case suggest that a more accurate charge would have been Section 463, accessory after the fact. The accuracy of the hold-back evidence was given too much weight regarding its probative value. MM was failed by the manner in which the court applied the *R. v. Hart* rules to his appeal. Even in cases where the hold-back evidence is strong, the ends alone cannot justify the means under Canadian law—even when it comes to bringing perpetrators of the most heinous crimes to justice:

> [207] A confession is more likely to be reliable if it leads to the discovery of details of the crime scene, describes unusual aspects of the crime, or refers to "hold back" evidence — provided, of course, such details or evidence could not be guessed or otherwise identified by the suspect. I agree with *amicus curiae* that, generally, an uncorroborated, unverified confession will not be sufficiently reliable and will be inadmissible. However, the inverse does not necessarily hold. The principle against self-incrimination is not solely concerned with ensuring reliable statements; even true statements may be excluded if they were obtained through abusive state conduct or through coercion that overrode the suspect's autonomy interest. (*R. v. Hart*, 2014 SCC [207])

Consistency between confessions—The police create an event that is intended to induce the discussion of the crime with the primary undercover operative which often leads to the first confession (*R. v. Yakimchuk*, 2017, p. 4). In *R. v. Worme*, police contacted Worme's loved ones and implicated him in murder, assuming this interaction would be shared with Worme (*R. v. Worme*, 2016, p. 11-12). The police in *R. v. Yakimchuk* released a sketch—from a fake witness—of Yakimchuk's face, to the media linking him to the murder (*R. v. Yakimchuk*, 2017, p. 4). Once the suspect has discussed the crime with their new friend, the primary undercover operative, they are required to confess again to Mr. Big—who, at the time, may be accompanied by the original undercover operative—who reinforces the importance of honesty (*R. v. MM*, 2015, p. 20). Yakimchuk stated that this strict requirement for honesty motivated him, not to be honest but to ensure that his two confessions were indistinguishable (*R. v. Yakimchuk*, 2017, p. 12). However, the similarities between his first and second confession reinforced the reliability and probative value when applying the *R. v. Hart* rules.

2. ABUSE OF PROCESS

Violence—To avoid amounting to an abuse of process, Mr. Big operations have decreased the use of violence against members within the same organization and begun to solely commit violence

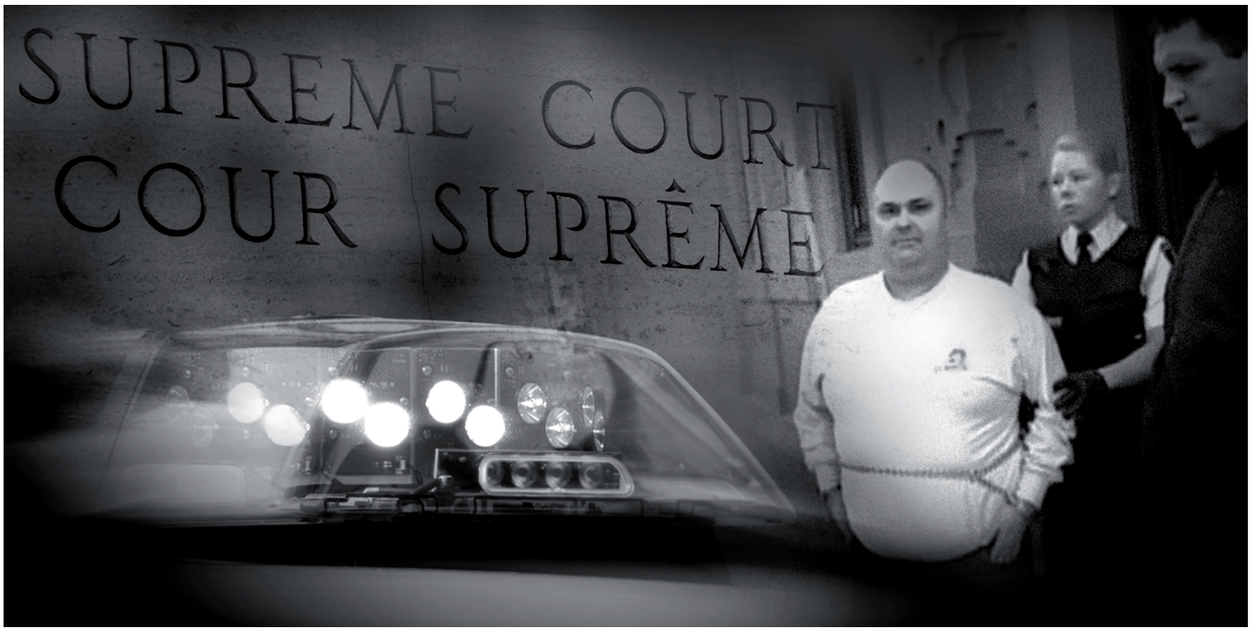
against those outside of the organization (*R. v. MM*, 2015, p. 19; *R. v. Yakimchuk*, 2017, p. 11). Ledesma, however, argued that although the violence was not directed towards him, the criminal organization's violent acts demonstrated their ability of inflicting violence on him (*R. v. Ledesma*, 2020, p. 21-22). Despite being told "we don't hurt our own", factually, members who betray the trust of criminal organizations are often treated with violence (*R. v. Ledesma*, 2020, p. 21-22). Its implicitness is palpable, and any reasonable person would expect nothing less from a gang (*R. v. Ledesma*, 2020, p. 21-22).

Suspect demeanor—In *R. v. MM, R. v. Yakimchuk*, and *R. v. Ledesma*, the Alberta court testimony emphasized that throughout the execution of violent pseudo-crimes the suspects' demeanors were "calm" or "appeared unbothered" (*R. v. Ledesma*, 2020, p. 21; *R. v. Yakimchuk*, 2017, p. 3; *R. v. MM*, 2015, p. 24). This argument was used against them and, under the *R. v. Hart* framework, lowered the perceived police "abuse of process" (*R. v. Ledesma*, 2020, p. 21; *R. v. Yakimchuk*, 2017, p. 3; *R. v. MM*, 2015, p. 24). In Bates' autobiography, *The Devil's Pupil*, he states having felt he needed to "act cool" (Bates, 2018, p. 121). Ledesma claimed he was "playing along out of fear" (*R. v. Ledesma*, 2020, p. 7). While in the presence of an assault, to prevent the violence from being turned towards oneself, any reasonable person with basic survival instincts would appear unbothered to prove that they are trustworthy. Remember, in the world of crime, being perceived as a potential "rat" is the fundamental "what not to be."

Mental health and vulnerability—Mr. Big operations are extremely psychologically manipulative (Moore, 2019, p. 2). If the suspect suffers from addiction, mental health disorders, or is relatively young, an operative's coercive behavior amounts to an abuse of process (*R. v. Hart*, 2014, p. 590-591). In *R. v. Bates*, the suspect was previously diagnosed with several disorders; his mental health was greatly negatively impacted by the Mr. Big operation (Bates, 2018, p. 128; *R. v. Bates*, 2009, p. 3-6). In another case, Andy Rose, an alcoholic, was ordered by Mr. Big to drink (Keenan & Brockman, 2010, p. 9-10). After hours of drinking, Rose stated: "We'll go with I did it, okay?" (Keenan & Brockman, 2010, p. 10). In *R. v. Ledesma* (2020), the suspect stated that he was an addict, and was provided with so much alcohol by officers prior to his meeting with Mr. Big that he vomited twice before arriving to the location of his Mr. Big interrogation, where he was given more alcohol by Mr. Big (*R. v. Ledesma*, 2020, p. 13). This was tantamount to preying on one's vulnerabilities and should have amounted to an abuse of process.

During a Mr. Big sting, the suspect is given little choice but to confess (*R. v. Hart*, 2014, p. 611). The nature of these operations teaches suspects that a violent past is a boast-worthy achievement (*R. v. Hart*, 2014, p. 574). The suspect may also say whatever he thinks Mr. Big wants to hear just to avoid his wrath (Moore, 2019, p. 7; *R. v. MM*, 2015, p. 2). Ninety-five percent of Mr. Big operations that produce confessions result in a conviction (Holmgren, 2017, p. 155). A trier of fact is more susceptible to believing a video admission of guilt than an explanation that the circumstances under which the confession was provided were coercive (Schleichkorn, 2013, p. 394). The confession in *R. v. Bates* is one of the only proven false confessions derived from a Mr. Big operation; and this, because he was lucky enough to have the one who had actually fired the gun come forward (*R. v. Bates*, 2009, p. 5; Bates, 2018, p. 156).

All Mr. Big operations feature financial inducement (*R. v. Yakimchuk*, 2017, p. 11). In *R. v. Yaikmchuk*, the defendant stated he lied to secure an extremely lucrative opportunity; however, this was rejected in court because he was employed (*R. v. Yakimchuk*, 2017, p. 7 & 11). One mustn't be as poor as Hart to be negatively motivated by money (*R. v. Allgood,* 2015). Allgood was bribed with a promise of $25,000 if hired by the organization (*R. v. Allgood*, 2015, p. 15). Unger, proven victim of a wrongful conviction, stated he lied because the officers glorified murder, and because he felt that admitting to murdering someone would increase his chances of being accepted by the gang and receiving large sums of money (*R. v. Unger*, 1993, p. 11; Puddister and Riddell, 2012, p. 391). The suspect's generous wage, the overt depictions of wealth of the other members of the organization, and the thousands in cash to which the suspect is exposed would be an attractive trap to many (*R. v. Buckley*, 2018, p. 6; Smith et al., 2010, p. 39; *R. v. Yakimchuk*, 2017, p. 11; Keenan & Brockman, 2010, p. 20).



The Mr. Big strategy is to have the suspect believe that the syndicate is capable of solving any of the suspect's financial problems, have the suspect become dependent on the associated wealth, then his or her valued job is threatened (Schleichkorn, 2013, p. 389). The suspect may keep their job if they provide a confession (Schleichkorn, 2013, p. 389). The authenticity of a confession provided under this context should be queried.

***R. v. Unger* (1993) - Mr. Big exoneration**—In 1991, the RCMP launched a Mr. Big operation on Kyle Wayne Unger (Innocence Canada, 2020, para. 14; *R. v. Unger*, 1993, p. 6). In court, the suspect argued that police encouraged him to confess regardless of the truth (*R. v. Unger*, 1993, p. 21). Unger, age 19, and Houlahan, age 17, were both convicted of first-degree murder (*R. v. Unger*, 1993, p. 6). Houlahan was tried as an adult (*R. v. Unger*, 1993, p. 6) and committed suicide when released on bail; he was deemed innocent posthumously in 1994 (Sherrer, n.d, p. 1; Innocence Canada. 2020, para. 20). In 2004, the scientific breakthrough of "mitochondrial DNA typing" was used post-conviction to demonstrate that the microscopy comparison evidence of the single hair used to convict Unger "was scientifically proven not to be his" (Innocence Canada, 2020, para. 21). As a result, Innocence Canada filed a review of Unger's conviction, and he was exonerated in 2009 (Innocence Canada, 2020, para. 24-25).

While the aura of criminality portrayed by the Mr. Big operation has a strong potential to encourage an individual to be honest about their own criminality (Holmgren, 2017, p. 156), it has an equal potential to induce one to lie or overstate their involvement in a crime. Subjects of Mr. Big operations are taught that confessing is a consequence-free ticket into a lucrative organization (*R. v. Hart*, 2014, p. 574). Suspects are offered a solution that will relieve them of legal responsibility in exchange for a confession (R. v. MM, 2015, p. 21; *R. v. MM*, 2012, p. 44-46). A suspect, when informed they are facing potential apprehension may, whether or not they have committed the crime, accept the fictitious quid pro quo for fear they will be found guilty anyway. This is the same reason why innocent people might choose to settle for a plea bargain.

CONCLUDING REMARKS

The analysis of the Mr. Big processes in the landmark *R. v. Hart* (2014) appeal to the Supreme Court brought about changes to common law around Mr. Big with regard to the risk of false confessions, prejudicial effects, and police abuse of process. New rules were implemented to protect the innocent and the process itself. However, subsequent appeals of Mr. Big cases have shown an inconsistent application by the courts of the two-pronged approach implemented to ensure legal protections laid out in *R. v. Hart*. For example, the circumstances of the accused in Mr. Big cases are frequently compared with the severity of Hart's personal circumstance at trial; yet one need not be severely vulnerable to succumb to the tricks of highly trained police officers equipped with weighty budgets and a team of specialized human resources. Mr. Big operations are carefully designed to be exceptionally manipulative and specifically tailored for the suspect. One's financial stability, social skills, or lack of mental illness should not be used to increase the reliability of a confession, nor to decrease the perceived police abuse of process. Anyone's integrity should be called into question when enticed with financial incentives by individuals encouraging an admission of guilt. Greater stringency should be placed on the admissibility of a Mr. Big confession. The risk of miscarriage of justice stemming from Mr. Big investigations is still high, despite the *R. v. Hart* ruling. The law should take all possible precautions to prevent wrongful convictions and bring undetected Mr. Big induced false confessions to justice (*R. v. Hart*, 2014, p. 577). ■

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RÉSUMÉ

A Critical Assessment of Mr. Big Operations and the Application of *R. v. Hart*

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« Mr. Big », également connu sous le nom de « technique canadienne » est une technique d'investigation utilisée par des policiers en civil pour obtenir efficacement des aveux (*R. c. Hart ; Smith, Stinson et Patry*, 2010, p. 39 ; Holmgren, 2017, p. 148). Cette technique a été mise au point dans les années 1990 par la Gendarmerie royale du Canada (GRC). Elle est utilisée dans les affaires qui n'ont pu être résolues dans le cadre d'enquête conventionnelle, surtout s'il s'agit d'un crime grave. Si certains, dont les groupes de défense des droits civils, les universitaires et les avocats de la défense, dénoncent le risque de faux aveux inhérent à cette technique, elle est louée par la GRC. Dans l'arrêt *R. c. Hart* (2014), la Cour suprême a ajouté une règle de common law à deux volets afin de se protéger des condamnations injustifiées et des abus de pouvoir dans les cas où les aveux avaient été obtenus grâce à la « technique canadienne ». Cependant, les analyses des décisions ultérieures font ressortir des incohérences dans la manière dont les tribunaux appliquent ce cadre juridique (Hart). Elles mettent aussi en évidence la nécessité d'ajouter des protections juridiques pour les sujets des « opérations Mr. Big ».

L'Association canadienne de justice pénale (ACJP) félicite CHANEL BLAIS, lauréate d'une bourse de l'Université Mount Royal, dont les avantages comprennent l'adhésion à l'ACJP et la publication de la version abrégée, sous forme d'article, du mémoire de Mme Blais (« A Critical Assessment of Mr. Big Operations and R. v. Hart ») - dans ce numéro d'*Actualités justice* !

Cannabis Act 2018

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Pointing out that the consumption of cannabis was widespread for decades prior to legalization under the Cannabis 2018 legislation, Borbolla contends that this law should include expungements rather than record suspensions and they should be applied automatically. The author uses the criminological theory of Merton (1938) – strain theory – and more recent research to opine that Canada's own history has had a major role to play in the over-representation of Indigenous people in drug convictions in Canada. Using a California law, which has not been fully implemented by the courts in many jurisdictions, as an example, Borbolla calls on Prime Minister Justin Trudeau to amend this law in an active act of reconciliation that recognizes and attempts to amend the harm done by past drug policy to our Indigenous communities.

According to a Vice (2018) article, not many Canadians know that Indigenous people are grossly overrepresented in cannabis possession arrests across the country (Browne, 2018). Yet, when we think about the legalization of marijuana in Canada, we tend to overlook how it affects the Indigenous communities around us. When running for Prime Minister, Justin Trudeau promised Canadians he would legalize cannabis in order to "protect the health and safety of Canadians by keeping cannabis out of the hands of youth." Trudeau kept his promise and in 2018 Bill C-45 commonly known as the *Cannabis Act* was passed, legalizing recreational cannabis all over Canada. The Health Canada (2021) website states that the main reason behind legalizing cannabis was to keep profit out of the hands of organized crime and criminals. Given the ongoing negative impact on Indigenous Peoples and other racialized groups in Canada of the former cannabis laws, however, more action is needed.

The benefits of legalizing marijuana are clear; however, the *Cannabis Act* fails to take the essential step of expunging prior marijuana convictions so we can start repairing the extensive damage done to Indigenous and other communities through racial disparities in drug convictions. As of the writing this article, the Canadian federal government is taking applications for Cannabis record suspensions, but only for people who have completed their sentence. Also troubling is the fact that suspensions are pardons not expungements, which means the conviction is not erased. Furthermore, this application process is lengthy, and only a handful of records have been suspended. I believe the process should be automatic and include those with outstanding charges.

The research and evidence to understand the historical importance of the *Cannabis Act* comes from the amazing work of Konstantia Koutouki and Kathrine Lofts (2019). Their article, *Cannabis, Reconciliation and the Rights of Indigenous Peoples*, contributed to understanding the effects of drug policy on Indigenous communities in Canada. Koutouki and Lofts explain the "distinct histories of colonization and cultural oppression" experienced by First Nations, Inuit, and Métis peoples in Canada. These experiences have given rise to "substantial burdens of social and health inequalities ... connected to a high burden of drug-related harms and drug- related structural violence, including over-representation in the criminal justice system for drug offences". Koutouki and Lofts thus point out that, historically, Indigenous peoples in Canada have carried a far greater share of the social and health burdens related to drug policy.

According to Koutouki and Lofts (2019), in Canada, Indigenous people make up 4.3 percent of the population but 23 percent of federal inmates, and minor cannabis possession offences are considered by many to be a "gateway" to the criminal justice

system (p.721). It's no secret that the criminalization of marijuana has proven to be an explanation for the over-representation of Indigenous people in Canada's federal prisons.

There are many myths and false stereotypes regarding Indigenous people, including that they commit crime because they have no respect for law and order (Browne, 2018). However, in my field of criminology and the larger field of sociology, the reasons behind why an individual decides to commit a crime become far more complicated. For example, Robert K. Merton's Strain (aka "anomie") theory looked at deviant behaviour in relation to pressure to succeed in Western society on the one hand, and society's inability to provide all citizens the means to achieve this goal on the other (Merton, 1938). The ensuing strain can affect the way people achieve their goals, either through legitimate means or illegitimate.

Merton's theory explains that when one tries to achieve their goals through illegitimate means, one's deviance can be due to being denied access to adequate educational opportunities and social support (Merton, 1938). Strain theory thus helps explain how the trauma Indigenous people have endured for over 150 years, including almost 120 years of residential-school abuse (1870-1990), has acted as a stimulus for crime in certain cases. It is noteworthy that one of the many developments ensuing from Merton's strain theory illustrates that some turn to illegal drugs to make themselves feel better (Agnew, 1992).

Indigenous people are not the only group facing strain in Canada or needing expungement due to racial disparities in cannabis convictions. Black communities and those characterized by low incomes are also overrepresented in drug convictions and addiction. The fact that some "700 tonnes" of cannabis are known to have been consumed in Canada between 1960-2015 (Statistics Canada, 2017) - the actual amount is likely higher – and that having a criminal record puts one at risk of social exclusion and strain, makes the case for expungement of all convictions by any Canadian citizen a moral necessity. In 2018, the State of California passed AB 1793, which expunges and/or reduces sentences for those with past and present cannabis convictions. Although the California Department of Justice has had 200,000 records expunged thanks to this process, some say the California courts "are failing" in this "key promise". However, even though the law says these U.S. records must be expunged, as many as "113 000 residents" still have records for marijuana convictions; and this can see them "disqualified from housing or deemed ineligible for public benefits" (Sacramento Bee, 2021).

It is about time the Canadian government pass a similar law and ensure it is carried out to the letter. Not only has the sale, possession and consumption of cannabis been legal since *The Cannabis Act* was enacted in 2018, it has arguably been deemed 'essential' with marijuana dispensaries staying open during the corona virus pandemic" (Sacramento Bee, 2021). Given the over-representation of Indigenous Peoples in drug charges and prisons, I call on Prime Minister Justin Trudeau to make this an active act of reconciliation that recognizes and attempts to amend the harm done to our Indigenous communities. ■

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RÉSUMÉ

Cannabis Act 2018

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Soulignant que la consommation de cannabis était répandue pendant des décennies bien avant sa légalisation en 2018, Mme Borbolla soutient que la *Loi sur le cannabis* devrait prévoir bien plus que l'effacement des peines déjà purgées. L'auteur s'appuie sur la théorie de la contrainte de Merton (1938) et sur des recherches plus récentes pour affirmer que si les Autochtones sont surreprésentés dans les condamnations pour infractions relatives à la drogue, c'est en grande partie à cause des contraintes imposées par l'histoire du Canada. S'appuyant sur l'exemple de la loi californienne, qui n'a pas été pleinement appliquée par tous les tribunaux, Mme Borbolla exhorte le premier ministre Justin Trudeau à modifier la *Loi sur le cannabis* dans un acte de réconciliation plus que symbolique, qui viserait à reconnaître et à réparer les torts que cette politique antidrogue a causés aux communautés autochtones.

COVID-19 and Domestic Violence: The 'Shadow Pandemic'

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As the COVID-19 pandemic continues to affect the daily lives of individuals across the world, the amount of damage done to public health continues to be measured. One area that has been greatly affected is the rate and severity of domestic violence (DV), mainly experienced by women. While stay-at-home orders may help slow the spread of COVID-19, the resulting social isolation may create dangerous situations where DV is occurring, but victims have fewer 'safe' opportunities to seek help. Canadian federal and provincial governments have responded by introducing legislation to combat intimate partner violence as part of new firearms laws, amending the Divorce Act and implementing Clare's Law. Various scholars, researchers, and Canadian organizations have made suggestions for how governments can work to support those affected by DV and how DV support agencies can help existing clients access services remotely.

Since the pandemic began in January of 2020, governments across the world have been working to protect public health by preventing the spread of COVID-19 through enforcement of various levels of restrictions and shutdowns. These decisions, such as limiting which businesses can be open or restricting certain gatherings, have been beneficial on hospitalization rates and for slowing infection rates (Bourne, 2021). Although these restrictions may be in the best interest of the public, they have driven increases in service calls for mental health (+11%) and domestic violence (+12%) and also increased feelings of risk for family violence due to social isolation (Public Safety, 4 March 2021).

Domestic violence (DV) has been a predominant theme in reports and editorials about COVID-19. While stay-at-home measures may help decrease the transmission rate of this virus, they definitely increase the risk of family violence and DV (Bradbury-Jones & Isham, 2020; Goh, Lu, & Jou, 2020; BMJ, 2020; Slakoff, Aujla, & PenzeyMoog, 2020). This increased risk augments the need for accessible supports and services. However, even before the pandemic began, agencies and shelters that work with those experiencing DV could not keep up with the demand (Slakoff, Aujla, & PenzeyMoog, 2020). The impact of COVID-19 restrictions on services is comparable to during a natural disaster, with some agencies having to severely limit or even stop their in-person services (Slakoff, Aujla, & PenzeyMoog, 2020). Limited resources and avenues of engagement with women may be a contributing factor to the inconsistent rate at which DV services are accessed.

DOMESTIC VIOLENCE RISING IN LEAPS AND BOUNDS DURING THE PANDEMIC

The Calgary Domestic Violence Collective found that DV calls decreased in the first few months of the pandemic, but family violence did diminish (Small, 2020). The lower rate of reporting is partly due to risks related to attempting to contact or access services while isolated at home with an abuser (Bradbury-Jones & Isham, 2020). A review related to Domestic Violence and COVID-19 in Taiwan uncovered similar risks, with family tensions escalating the longer they were encouraged to stay home (Goh, Lu, & Jou, 2020). Concerning whether or not increased risks have translated to increased violence, a survey administered to staff and volunteers at DV agencies in Canada found that the severity of violence experienced by women had increased, with 82 percent of respondents

(i.e., staff) reporting a noticeable increase in cases involving strangulation (Dubinski & Margison, 2020).

Service providers responding to individuals experiencing domestic violence feel overwhelmed by the volume of calls. For example, Canada's Assaulted Women's Helpline numbers soared from 12 352 calls from September to December in 2019 to 20 334 over the same months in 2020 (Thompson, 2021). A similar leap happened in the European Union member States, which saw an almost quintupled rate of online inquiries to DV agencies for strategies to prevent violence (BMJ, 2020). As of February 2021, "Canadian social service agencies [were] fielding almost double the number of domestic abuse reports as they did a year ago" (Donato, 22 February 2021).

GAPS IN KNOWLEDGE ABOUT DOMESTIC VIOLENCE IN CANADA PREDATE COVID-19

According to three Canadian law professors, Jennifer Koshan (U of Calgary), Janet Mosher (Osgoode Hall-ON), and Wanda Wiegers (U of SK), domestic violence has existed alongside Covid-19 as a "shadow pandemic" of violence against women. The three conclude "that despite some positive government responses and judicial decisions, COVID-19 has exposed many gaps in knowledge about DV and the supports and other resources needed to make women and children safe; and this situation long predates COVID-19 (Koshan, Mosher, and Wiegers, 2021).

It is also important to recognize that – pandemic or not - many incidents of family violence never come to the attention of the police: "Only 30% of Canadians say police are aware of incidents where their spouse had been violent or abusive" (Public Safety, 4 March 2021). Yet, as of 2018, "In Canada, a woman or girl [was] killed every 2.5 days, on average, usually by a current or former male partner (Public Safety, 2018).

CANADA'S RESPONSE TO DOMESTIC VIOLENCE DURING THE PANDEMIC

"Recognizing that COVID-19 has increased the rates and severity of gender-based violence (GBV), the Government of Canada has provided $100 million directly to organizations that support survivors and their families" (Canada.ca, 11 February 2021). The federal government has also broadened the definition of Family Violence in Canada's Divorce Act to include mental and emotional as well as physical violence and has designed proposed firearms legislation in part "to help prevent and deter domestic violence" (Public Safety, 2021). Early on in the pandemic, the Canadian Women's Foundation (CWF) created the Signal for Help, "a simple one-handed sign someone can use on a video call to help them silently show they need help" (CWF, 2020). The CWF also hosts a Support website offering links to shelters, other services, and information across the provinces and territories (CWF, n.d.).

CONCLUDING REMARKS

There are many ways that governments, health care systems, and relevant agencies can work together to support those experiencing DV. In the province of Alberta, Clare's Law, which will allow individuals to perform an informal check on their partners for past DVs, was officially adopted during the pandemic (Smith, 2021). The implementation of this law in Alberta and Saskatchewan will allow the RCMP "to participate in a measure aimed at preventing people from becoming victims of domestic abuse" (Global News, 31 March 2021). Clare's Law affords a more preventative approach to DV that could prove vital as the pandemic continues to create isolation.

A ground-breaking book by Danielle C. Slakoff, (California State University, Sacramento), Wendy Aujla (University of Alberta) and Caitlin PenzeyMoog (Writer/Editor, Chicago) (2020) outlines some best practices, but emphasizes that the impact of shifting to primarily online access will not be known for some time. As well, aside from service accessibility for those affected by domestic violence, efforts must be made to better understand the 'why' behind the prevalence of domestic violence in Canada. ■

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RÉSUMÉ

COVID-19 and Domestic Violence: The 'Shadow Pandemic'

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Alors que la pandémie de COVID-19 bouleverse encore la vie quotidienne des individus à travers le monde, l'ampleur des dommages causés à la santé publique continue d'être mesurée. Un domaine très touché par la pandémie est celui de la famille, où l'on enregistre une hausse marquée des cas de violence conjugale, dont les femmes sont les principales victimes. Si les ordres de rester à la maison contribuent à ralentir la propagation de la COVID-19, l'isolement social qui en résulte peut créer des situations dangereuses, car les victimes de violence conjugale ont moins de latitude pour demander de l'aide en toute sécurité. Les gouvernements fédéral et provinciaux ont réagi en présentant une mesure législative visant à combattre la violence conjugale en vertu de nouvelles lois sur les armes à feu, en modifiant la *Loi sur le divorce*, et en mettant en œuvre la *Clare's Law*. Des universitaires, chercheurs et organismes canadiens ont formulé des recommandations quant à la manière dont les gouvernements pourraient soutenir les personnes touchées par la violence conjugale et dont les organismes offrant du soutien aux victimes pourraient rendre leurs services accessibles à distance.

PART 1 Critical Thinking and Criminal Decision Making

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Research into the links between criminogenic behaviour and decision making stretches back centuries to the classical philosophers, early criminologists and, later, behaviourists. Such knowledge is relevant to the understanding of various types of criminal decision making associated with involvement in or with a criminal gang. In relation to criminal decision making, gangs can lure or groom (often already marginalized) youth with a 'party' lifestyle and a sense of social, albeit subcultural, inclusion. Once ensconced, they may feel little hope of escaping the gang life, let alone of obtaining a good, steady job. Sub-cultural social bonds, low self-control, social disorganizations, unemployment, deviant peers, and money dreams can contribute to bad decision making and result in a criminal act.

Criminal mindsets are often complex, making it difficult for the average person to fathom the individual criteria related to decision making. While people can be categorized by ethnic group, individual differences are also always present (Bernasco, Van Gelder and Elffers, 2017). It is important to note at the outset, that the term "criminal" in this paper is used to refer exclusively to people who have committed criminal acts; whether people are wholly criminal is beyond the scope of this article. As well, the term "criminogenic" is herein defined as "producing or leading to crime" and used in relation to various types of criminal behavior and also the decision making that leads to the action or execution of a crime (Merriam-Webster Dictionary, 2019).

The criminal mindset can be said to prioritize things like money, drugs, alcohol, loyalty, and/or fearlessness, and a willingness to take risks (Bernasco, Van Gelder and Elffers, 2017). Gang members may denigrate the regular 'working stiff', despising them for scrimping and saving for future benefit. Social marginalization, such as poverty and racial intolerance, seems to precede and make certain individuals – especially youth - vulnerable to the lure of a subcultural society – the gang - that thinks nothing of disrupting regular society from its margins. For such criminals, the gang is the only society that matters. Some of the classical theories on criminal behaviour offer food for thought, especially when fathomed with more recent theories including those related to gangs.

The "Greek philosophers chronicled how people's short-sighted passions got them into trouble when obscuring reason and lead them to engage in behavior that ran counter to their best interest" (Elffers and Van Gelder, 2017, p. 125). In 1649, Descartes, one of the original social contract philosophers, stated that "passions too could contradict deliberation and, if intense enough, be self-defeating by overpowering the mind's countervailing efforts… they don't know how to put these passions to good use" (1649/1989, p. 125). Both of these perspectives suggest the existence of an internal battle in individuals that could lead to criminal tendencies.

The complexity of the mind was also a subject of great interest to other enlightenment philosophers. Adam Smith (1790), for example, took a utilitarian perspective - that human behavior involves a struggle between the 'passions' (i.e., emotions and drives such as hunger and desire) and the 'impartial

spectator', which he envisioned as an internal voice of reason able to moderate the passions that drive human behaviour (p. 220/221). This went against David Hume's (1739-40/1985) earlier argument that reason is the slave of the passions (in Marar, 2012, p. 84). Put more simply, Hume's view abords the inertness of reason, and its inability to generate impulses for the mind (ibid.). Thus, while Hume considered that only people's passions, which depend to some degree on their life circumstances, can inspire them to be ethical, Smith reasoned contrarily that people's ethics are given by an innate capacity for rational decision making.

EARLY RATIONAL CHOICE THEORY

Ahead of his time, the Dutch philosopher and humanist Dirck Volckertszoon Coornhert was an early proponent of penal/criminal justice reform. In *On Disciplining Villains*, Coornhert (1587, p. 57) argued that "offenders prefer the short, quick, sudden death of capital punishment over the long-lasting misery of a slow death that is a life in grim poverty". Almost a century later, the social contract ideas of philosophers such as John Locke (1689) and Thomas Hobbes (1651) would set the stage for change: Hobbes believed that people require absolute rule because they are innately selfish, while Locke (1689) decried the unilateral social contract maintained through absolute power and punishment. Hobbes and Locke both found that notions of consent/law and order represented a shift away from authoritarianism, and the way toward justice rooted in democracy was struck.

The rational choice theory of criminal law is widely attributed to Cesare Beccaria (aka the 'father' of criminal law and modern criminal justice); crime is a personal choice and therefore the threat of punishment should be an effective deterrent. Beccaria (1764), saw a contradiction between the concept of rational thinking and the way the death penalty was being administered (i.e., in a public display of brutality). Beccaria argued that the use of capital punishment and torture as a means to deter capital and other types of crime was itself irrational: "the laws, which are the expression of the public will and which detest and punish homicide, commit murder themselves, and in order to dissuade citizens from assassination, commit public assassination" (Zimring, 2004). Beccaria's manifesto [*On Crime and Punishment*] demanded abolition of capital punishment and advocated criminal law reform (Beccaria, 1764). Beccaria's theories can be grouped under the broader label of deterrence theories based on a presumption of rational choice and free will and a belief in normative judgements, which laws are designed to uphold.

PRIORITIES, OPPORTUNITY, ENVIRONMENT, AND THE RISE OF GANGS

John Watson, a psychologist known as the 'father of behaviourism' wrote, "man both talks and thinks with his whole body" (Watson 1924, discussed in Malone, 2017). In 1977, the social cognitive psychologist, Albert Bandara also contended that most of human behaviour is a result of one's environment (Watson, 1924, discussed in Malone, 2017) via operant conditioning, classical conditioning, rewards, and punishments; behaviour is shaped through negative and positive reinforcements through external stimuli (ibid.). This theory describes behaviours as being conditioned into people. Exposure to bad elements can lead some to criminal behaviour.

Numerous theories of criminal behaviour exist today, premised on rational choice and deterrence theory but related to specific types of crime and to external factors such as opportunity; for example, situational crime prevention developed initially (Clarke, 1980 discussed in Freilich and Newman, 2020) and routine activity theory (Clarke and Felson, 1993), among others –all make some sense in their own ways but none have been 100 percent

"Much of the research literature suggests that gang affiliation often provides psychological, social and/or economic benefits, and that those who become involved with gangs do so to meet unfulfilled needs" (Chettleburgh, 2007; Wortley & Tanner, 2006 [In Dunbar, 2017]).

reliable in comprehensively describing or predicting criminal behavior. Collectively, however, they offer a framework for thinking about and explaining human behavior in relation to crime.

Criminogenic behavior weighs the costs and benefits of crimes, but with a different set of priorities than those of the average individual who successfully functions 'rationally' within the social norms and associated processes (Bernasco, Van Gelder and Elffers, 2017). Where the classic theorists argued that most people refrain from criminal behaviour to conform to social roles regulated by legal norms and enforced by fear of punishment, Mcleod (2008) explains that social norms provide structure and order in society, which is why an average rational individual, most of the time, will conform (ibid.). Rational choices against criminality, which themselves are deterrents to crime, can thus be said to emanate from a desire for social inclusion, a sense of morality, and/or the fear of punishment (Mcleod, 2008).

Certain criminal behaviours and decision making can thus also be attributed to a gang lifestyle. Street drugs, alcohol, immediate money, and violence can lure people from conventional life, into a "street" or "party" lifestyle in which one becomes accustomed to immediate rewards, as opposed to the delayed rewards the working stiff works and saves for (Bernasco, Van Gelder and Elffers, 2017).

RATIONAL CHOICE

Other subcultural explanations of gang delinquency indicate that social factors such as race, family life, education, opportunities and abuse which can also influence the decision of whether an individual will join a gang or be targeted, lured and groomed into this way of life. The gang lifestyle is criminal, violent, and often immersion in this group mentality can impact one's decision making. As the Norwegian social and political theorist Jon Elster (1989) pointed out, "when faced with several courses of action, people usually do what they believe is likely to have the best overall outcome" (p. 22). Elffers and Van Gelder (2017), Dutch researchers, explain this model as follows:

> "Within this paradigm, the expectation of emotions to be experienced as outcomes of a decision is well covered. For example, would-be offenders could expect to feel uneasiness if their spouse would hear of their misbehavior, they may fear the loneliness of being confined in a prison cell, they may look forward to the praise they will get from their mates for a successful offence, etc." (Elfers and Van Gelder, 2017)

This model factors the impact of emotions into rational choice, how one may affect the other. It shows the internal battle of outweighing one decision over another, to get to the best result.

Another similar representation of this concept is the "Becker Model". This model underlies the modern prison system. It consists of the rationale of how "people weigh the costs against benefits in their decision to commit crimes" (Chrismas, 2013, p. 20). Chrismas explains how this theory posits punishment of imprisonment as a deterrent to crime, however some people are not deterred by this threat; for example, "once a youth has been to the Manitoba Youth Centre, the threat of imprisonment is dissipated and he or she is less afraid of getting caught committing crimes in the future" (Chrismas, 2013, p. 20). This can be due to individuals becoming more familiar with and normalizing the process.

CONCLUSION

This article (Part One) has explored various theories of criminogenic behaviour and decision making dating back in time to a present day focus on

gangs. Research points to emotions having a major impact on decision making to the point of taking over the decision making process completely, leaving no room for considering risk or costs. Social marginalization, such as poverty or racial intolerance/discrimination, seems to make certain youth emotionally vulnerable to the lure of a subcultural society, the gang. ■

NOTE: Part 2 of this Article – Current Frameworks for Criminal Decision Making – will be published in No. 36.3 of the *Justice Report*. It will delve deeper into the gang phenomenon and current frameworks for criminal decision making.

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RÉSUMÉ

Critical Thinking and Criminal Decision Making – *Part One

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Les études démontrent que les liens entre le comportement criminogène et la prise de décision remontent à des siècles, aux philosophes classiques, aux premiers criminologues et, plus tard, aux comportementalistes. Ces connaissances nous aident à mieux comprendre les différents motifs susceptibles de pousser une personne à s'associer à un gang criminel. En ce qui concerne le processus décisionnel et le comportement criminel, les gangs peuvent attirer ou préparer des jeunes (souvent déjà marginalisés) en leur proposant un style de vie « festif » et en leur procurant un sentiment d'appartenance sociale, bien qu'en marge de la culture dominante. Une fois installés, ces jeunes ont souvent peu d'espoir d'échapper à la vie de gang, et encore moins d'obtenir un bon emploi stable. Des liens sociaux marginalisés, une faible maîtrise de soi, la désorganisation sociale, le chômage, des pairs déviants et des rêves de fortune peuvent amener ces jeunes à prendre une mauvaise décision et à sombrer dans la criminalité.

La deuxième partie de cet article, qui paraîtra dans le volume 36.4 d'*Actualités justice*, examinera plus en profondeur le phénomène des gangs et les cadres actuels de prise de décision en matière de criminalité.

STUDENT BOOK REVIEW SECTION
with Review Editor, Dr. John Winterdyk

Reviews are published in the language submitted / Les recensions sont publiées dans la langue soumise.

"Go Ahead and Shoot Me! And Other True Cases About Ordinary Criminals"

Doug Heckbert | Durvile Publications Ltd., p. 270. | Price: $ 35.00 (CDN)

REVIEWED BY AMANDA SHERRY
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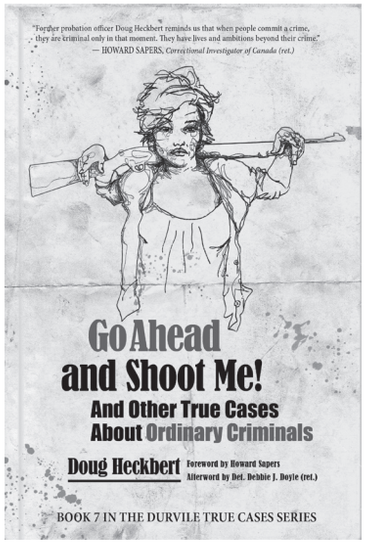
Go Ahead and Shoot Me! And Other True Cases About Ordinary Criminals explores the lives of 'ordinary' individuals who have encountered the criminal justice system. This book showcases the struggles faced by some people who we, as a society, may not consider before casting our judgements. Doug Heckbert presents 26 stories about people he served over his many years as a probation officer and a few other stories about people he came across while writing this book. These stories enlighten the reader about the different circumstances and situations that can arise and 'cause' ordinary people to become criminals in the eyes of the law.



The book's title is derived from the first story presented, which involves a woman the author calls "Sally". Even with his years of experience, Doug Heckbert admits having expected Sally to be "quite something to deal with". Yet, after looking through her case file, he had come to realize that Sally, who was accused of attempted murder, was an ordinary woman with an everyday life. Sally and her intoxicated husband had gotten into a dispute one evening. In the heat of the moment, he insisted she shoot him! "And she did!".

Other stories, such as "Paul's", explore the issues/cycles of alcoholism and drug addiction. To give the reader insight into the power of addiction, the author uses Paul's and other testimonials to explain how their drug use came to be, its impact on their lives, and the lengths to which people will go to avoid or stop going through withdrawal.

The reader is given insight into how people may come to commit a controversial crime, such as abortion, which is now legal. Two mothers, "Theresa" and "Agnes", who had both recently become pregnant, had (unsuccessfully) decided "to help each other have an abortion" since there were no healthcare options available to them. Go Ahead and Shoot Me! also reveals how some of the many issues facing the Indigenous Peoples faces in Canada, such as "Paula", can lead to them entering and remaining entrenched in the criminal justice system. Paula's story also conveys the importance of restorative justice and greater inclusion of Elders for healing within the criminal justice process.

Finally, the author encourages and challenges readers to rethink how they view criminals and criminality and to be careful not to turn "a blind eye to their circumstances". Through the stories he shares in this book, author Doug Heckbert helps the reader understand how history and circumstance can come together to influence some people's behaviour. Collectively, the stories in *Go Ahead and Shoot Me!* call into question whether offenders always have both the *actus reus* and the *mens rea* for their crime and suggests that change might be needed within the criminal justice system to clarify who the criminal justice system, and thus society, classifies as 'criminals and how. ■

RÉSUMÉ

Student Book Review Section
– Dr. John Winterdyk, Ed.

***Go Ahead and Shoot Me! And Other True Cases About Ordinary Criminals*, de Doug Heckbert (Durvile Publications, 2021).**

AMANDA SHERRY
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Amanda Sherry explore comment le témoignage de probationnaires et de détenus en liberté conditionnelle et les anecdotes racontées par l'expert en justice, Doug Heckbert, remettent en question la légitimité des exigences de l'actus reus et de la mens rea.

COMING EVENTS
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***GONZAGA INTERNATIONAL CONFERENCE ON HATE STUDIES**

THEME - THÈME * Justice and Equity: Challenging Hate and Inspiring Hope

PLACE - ENDROIT * Gonzaga University, Spokane, WA (USA)

INFORMATION * www.gonzaga.edu/icohs

NOVEMBER 17-19 NOVEMBRE 2021

45TH ANNUAL CIAJ CONFERENCE: INDIGENOUS PEOPLES AND THE LAW
45E CONFÉRENCE ANNUELLE DE L'ICAJ : LES PEOPLES AUTOCHTONES ET LE DROIT

Canadian Institute for the Administration of Justice - Institut canadien d'administration de la justice

THEME - THÈME * Reconciliation with Indigenous Peoples of Canada
La réconciliation avec les peuples autochtones du Canada

PLACE - ENDROIT * Fairmont Hotel Vancouver (BC)

INFORMATION * https://ciaj-icaj.ca/en/upcoming-programs/2021-annual-conference

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SEPT. 28 – OCT. 1 2022

5TH WORLD CONGRESS ON PROBATION AND PAROLE

Organized by the Canadian Criminal Justice Association (CCJA) in collaboration with the Parole Board of Canada (PBC), the Correctional Service of Canada, Public Safety Canada, and the Royal Canadian Mounted Police.

Organisé par l'Association canadienne de justice pénale en collaboration avec la Commission des libérations conditionnelles du Canada, le Service correctionnel du Canada, Sécurité publique Canada et la Gendarmerie royale du Canada.

THEME - THÈME * No one left behind: building community capacity
Ne laisser personne de côté : renforcer la capacité communautaire

PLACE - ENDROIT * Delta Hotel Ottawa (Canada)

INFORMATION & CALL FOR PAPERS - APPEL DE COMMUNICATIONS* www.ccja-acjp.ca/pub/en/events

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SEPTEMBER 23 2022

ICCCL 2022 INTERNATIONAL CONFERENCE ON CRIMINOLOGY AND CRIMINAL LAW

Organized by the World Academy of Science, Engineering and Technology

THEME - THÈME * Justice and Equity: Challenging Hate and Inspiring Hope

PLACE - ENDROIT * Vancouver, British Columbia

INFORMATION * https://waset.org

Please send notices about your events to ccjapubsacjp@gmail.com so we may add them to the list of Coming Events.
Veuillez envoyer les annonces pour vos événements au ccjapubsacjp@gmail.com nous permettant ainsi de les inscrire dans la liste des «Prochains événements».

CALL FOR PAPERS DEADLINE - DATE LIMITE DE SOUMISSION

DECEMBER 15 DÉCEMBRE 2021